No. 20719

In the

United States Court of Appeals

For the Ninth Circuit

GEORGE R. WILLIAMS, et al.,

Appellants,

vs.

PACIFIC MARITIME ASSOCIATION, a non-profit corporation, INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, an incorporated association, et al.,

Appellees.

Brief of Appellee Pacific Maritime Association

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Brief of Appellee Pacific Maritime Association

This brief is filed on behalf of appellee Pacific Maritime Association (PMA). The other appellees - including the International Longshoremen's and Warehousemen's Union (ILWU), International Longshoremen's and Warehousemen's Union, Local 10 (Local 10), and individual defendants holding official positions with ILWU and Local 10 - are submitting a separate brief.

STATEMENT AS TO JURISDICTION

Appellants assert that the federal courts have jurisdiction over their claim on the basis of § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185. The district court's jurisdiction under § 301 is precisely restricted to "suits for violation of contracts between an employer and a labor organization . . . or between any such labor organizations".[1]

Appellee asserts that federal jurisdiction does not exist because there are no facts that would support a finding of federal jurisdiction on trial of this case. In taking this position, we are not at issue with respect to any question of the sufficiency of pleadings, either to raise a federal jurisdiction claim or to withstand a simple motion to dismiss the pleadings. This case has moved beyond these preliminary issues. We shall direct our discussion to facts that led to the order for summary judgment, which was based on the pleadings and exhaustive affidavits.

Appellants have filed five successive complaints in the district court, each alleging § 301 jurisdiction. The district court, with great patience, permitted appellants five opportunities to frame and reframe their complaint. Repeatedly they were also permitted to redraft their allegations so as to present, by affidavit, their version of all of the factual matters thought by them to have a bearing on their complaint. The court finally dismissed their fourth amended

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1. Section 301(a), 29 U.S.C. § 185(a) reads:
"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

complaint without leave to amend.[2] It is manifest from the allegations of the complaint and from the evidentiary matter submitted to the trial court by affidavit that, even on the facts as appellants claim them to be, they cannot frame a complaint stating a violation of a collective bargaining contract and cannot establish such a claim at a trial. On this ground we submit that the district court has no jurisdiction to hear the matters of which appellants complain.

On this appeal, appellants have added a new claim of federal jurisdiction based on 28 U.S.C. § 1337, giving the district courts jurisdiction of "... any civil action ... under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies". The act "regulating commerce" in this matter could only be the Labor Management Relations Act of 1947 (29 U.S.C. § 141, et seq., including § 185). That statute, by its very wording and by court interpretation, bars district court jurisdiction of the case unless there is federal jurisdiction under § 301 (29 U.S.C. § 185). The allegation of independent federal court jurisdiction under 28 U.S.C. § 1337 is totally without merit.

This Court has jurisdiction to hear the appeal under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

This appeal is from the order of the District Court for the Northern District of California, dismissing the fourth amended complaint of appellants and granting summary judgment in favor of appellees.

The motions to dismiss the fourth amended complaint were based on the pleadings and affidavits submitted by appellee PMA and an affidavit submitted by one appellant.

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2. Hereafter we shall frequently refer to the fourth amended complaint simply as "the complaint" without further description.

The "Statement of the Case" submitted by appellants ignored the undisputed facts set forth in the affidavits submitted by appellee PMA in support of its motion to dismiss. These are:

1. The affidavit of B. H. Goodenough, Vice President of Pacific Maritime Association, filed September 1, 1964, and its attached exhibits A, B, C, D and E. (R. 1-6).
2. The affidavit of J. A. Robertson, Secretary of Pacific Maritime Association, filed October 2, 1964, and its attached exhibits F and G (R. 749-767).
3. The affidavit of J. A. Robertson, filed March 18, 1965, and its attached exhibits H and I. (R. 82-91aa).
4. The affidavit of J. A. Robertson, filed July 2, 1965, and its attached exhibits J, K and M. (R. 176-180d).

PMA believes that appellants have not presented a proper statement of the case in their brief. Accordingly, we state the case here, basing our discussion on facts as to which there is no controversy.

A. The parties were all directly involved in the employment of longshoremen in San Francisco.

This case involves, on the one hand, a group of men who were formerly employed as longshoremen in San Francisco and, on the other, their employers and their union.

Appellants, plaintiffs below, formerly worked as longshoremen and seek to litigate their discharges.

Appellants at one time were limited registration (Class B) longshoremen on the San Francisco waterfront. Prior to starting this case, each appellant applied to advance from this probationary seniority status to full (Class A) registration status. His application was denied, his registration status was terminated, and he was discharged ("deregistered") because he failed to meet the established standards to advance in seniority status as a longshoreman.

Appellees, defendants below, are the employers, the union and certain union officials.

Appellee Pacific Maritime Association (PMA) is the collective bargaining representative of employers of longshoremen in the San Francisco Bay Area and elsewhere on the Pacific Coast (R. 1). Appellee International Longshoremen's and Warehousemen's Union (ILWU) is the exclusive collective bargaining representative of the longshoremen (R. 1, 109, 110). Appellee Local 10 is a chartered local union affiliate of the ILWU limiting its membership and activities to the San Francisco area (R. 110). The individually named appellees are described in the complaint as "officers or executive officials of the defendant labor organizations" (R. 120, ¶ 52). None is an officer, employe, or agent of PMA.

B. The appeal before this Court involves the terms of the ILWU-PMA collective bargaining contract and its administration.

Appellants claim they should be returned to employment as registered longshoremen under the ILWU-PMA collective bargaining contract, and with greater seniority than they had prior to their discharges in 1963. Appellants attack provisions of the contract, as it was in effect in 1963, and its administration. The history of collective bargaining on the San Francisco waterfront is of major significance to understanding the problems presented here.

1. The nature of longshore employment is unique.

The ILWU-PMA collective bargaining contract reflects the unique nature of longshore employment. Because of this, it is notably different in several respects from union-employer contracts in other trades. It is not characteristic of the longshoreman's job that he reports to a regular work place or even to a number of places designated by a single employer. Rather, he reports to a dispatching hall and from there is dispatched to work assignments for any one of the

many employers who are represented by PMA for collective bargaining purposes. This dispatching hall serves as the means of communication between the many employers and the many longshoremen; through it each longshoreman is told for whom he will work that day, at which of the many ships and docks he will work, and his time to report. Through the same dispatching process, each employer gets the men it needs for each of its many operations, at the time and place that they are needed.

2. Essentials of basic structure and underlying principles of the ILWU-PMA contract are refinements of the 1934 federal arbitration award.

(a) Since 1934 the ILWU-PMA contract has provided a system of registration to accomplish decasualization of longshore labor on the Pacific Coast. In 1934, the entire Pacific Coast experienced a longshoremen's strike that caused staggering injury to the maritime industry - employers and employes alike - and to the public. Because of the impact on the national economy and welfare, President Roosevelt appointed the National Longshoremen's Board as arbitrators to settle the dispute. The Board concluded that the casual nature of the longshoreman's job, resulting from the lack of control over the entry of workers into the longshore labor force and over their continuing status, was a significant cause of the 1934 strike. Accordingly, the Board ordered a program of decasualization among Pacific Coast longshore employes and the inauguration of a system of "registration" to provide such decasualization (R. 750).

While the system of registration has been refined over the years, its essence remains today as it was established by the 1934 award. The size of the registered list for each port has been controlled to be in balance with long-term expectations as to the hours of work to be assigned to these men. Each man on the list has a regular, not a casual employment, job. As a result, West Coast longshoremen have achieved steady

employment, high and regular earnings, permanent security in these regards until retirement, and protection against discharge after full (Class A) registration has been achieved (R. 751-752).

(b) Since 1934 the ILWU-PMA contract has provided a seniority system with seniority preference in the dispatching of longshoremen to their work. Since 1934 all longshoremen have been dispatched to their daily work through halls operated jointly by the union and the employers (R. 4, page 42). To effectuate the decasualization of the jobs of the registered longshoremen, the award provided that only men on the registered list could be dispatched to longshore work while any man on the list was able and available to perform the work (R. 4, page 43). This was the initial recognition of seniority preference through the registration system. It is the essence of the decasualization process.

Three basic seniority classifications are now used in the administration of the ILWU-PMA contract. The core of longshore labor consists of the fully registered (Class A) longshoremen. To supplement this work force, a system of probationary (Class B) limited registration was developed (R. 751). Provisions were made for advancing men from the probationary group to full (Class A) registration from time to time as needed. A third category of "casual employes" also exists; it includes the longshoremen on neither registered list. In view of the three basic seniority classifications, a Class B longshoreman will not be dispatched so long as a fully registered (Class A) longshoreman is able to perform the work and is available for dispatch (R. 4, page 45). Similarly, no casual longshoreman will be dispatched so long as a Class B man is able to perform the work and is available for dispatch (R. 4, pages 43, 45). These three basic seniority classifications have led to three

corresponding gradations in the other consequences of seniority, including steadiness of employment, amount and regularity of earnings, security against lay-off, likelihood of discharge, selection of work classifications, promotion, guarantees and vacations, welfare, pensions, and other fringe benefits.

(c) The 1934 award, and the succeeding ILWU-PMA contracts, have also provided for a system of joint labor relations committees. Joint committees were established on the principle of equal voting power between the union, on the one hand, and the employers, on the other hand (R. 4, pages 63-64). They were given the duty and power of controlling the registration lists. They also were given the authority to handle grievances arising in the course of living under the collective bargaining contract, whether presented by individual employes, the union or the employers. The joint committees thus have a direct and active role in the administration of the collective bargaining contract, particularly in the recruitment and selection of employes and in advancing them in seniority status. This type of joint participation in initiating contract administration action, which may be unique in American industry, is a natural outgrowth of the vision of the National Longshoremen's Board in 1934 in establishing the foundations of a form of industrial self-government geared to this unique industry and tailored to meet realistically its day to day problems.

At the present time there are three levels of committees; the lowest are at the port level ("Joint Port Committee"), the next at the area level ("Joint Area Committee"), and the highest at the coast level ("Joint Coast Committee"). Since 1934 there have been provisions for resolution of disputes through arbitration where the joint committees cannot resolve a dispute. The arbitrators now have permanent, not *ad hoc,* appointments. (R. 4, page 71).

3. The relevant terms of the contract in effect in 1963 are found in a number of documents of the ILWU-PMA contract.

The basic document of the collective bargaining contract between PMA and ILWU is entitled "Pacific Coast Longshore Agreement (1961-1966)" (R. 4). This basic document, continues in effect the essentials of the 1934 award, referred to above, and other basic principles there set forth. Many are not common-place in collective bargaining; others are typical products of nature collective bargaining relationships.

The overall agreement provides a system of self-government for waterfront labor relations. It includes terms on such subjects as wages and hours, registration and deregistration, dispatching practices, seniority preferences, discipline of employes, joint labor relations committees, contract administration and grievance-arbitration procedures, nondiscrimination, promotions, holidays and vacations, work methods, mechanization and modernization, welfare, pension, and other fringe benefits, etc. The basic document is supplemented by local rules and agreements, as well as supplemental documents of coastwide application, filling in the interstices in the basic document's fundamental law of waterfront labor relations. It is explained and interpreted in a history of joint actions and arbitrators' awards. The contract also includes many other products of the day-to day conduct of labor relations that amplify, implement, supplement, effectuate, interpret and apply the provisions set forth in the basic document.

(a) The ILWU-PMA contract binds appellants and appellees. The contract binds not only Pacific Maritime Association as an entity, but also the employers comprising the Association. It also binds the ILWU and its longshore locals. It also binds the individuals represented by the

ILWU, all the longshoremen in the collective bargaining unit (R. 4, page 1). This is as required by § 9 of the National Labor Relations Act (29 U.S.C. § 159).

(b) The contract gives the joint committees control as to who should be on the registered list. Section 8.31 of the contract (R. 4, page 44) provides that the Joint Port Labor Relations Committees, "subject to the ultimate control of the Joint Coast Labor Relations Committee, shall exercise control over the lists in that port including the power to make additions to or subtractions from the registered lists as may be necessary". Detailed provisions as to registration and deregistration of longshoremen have been negotiated. In 1958 a set of rules governing registration was adopted through collective bargaining (R. 123) and in 1963 supplementary provisions were adopted providing standards for advancing or dropping Class B men in the San Francisco area (R. 91w). The "1963 Rules" and the older "1958 Rules", to the extent that they have not been superseded, are parts of the collective bargaining contract involved in this appeal.

(c) The 1963 Rules preclude Class A registration for any man whose longshore work record shows that he is below grade on basic standards of work conduct. The rules appear in the record (R. 91w) and they have also been reproduced at page 29 of Appendix B to this brief. In summary, they preclude unlimited (Class A) registration for a man who has a record of dishonestly reporting his hours worked in order to obtain preference in assignments, or for failing to pay his pro rata share of the dispatching hall, or for having a poor record of availability for work, or for intoxication or pilferage.

C. Appellants failed to meet the registration standards adopted as part of the collective bargaining contract.

In 1959, applications were submitted from a large number of men seeking registration as Class B probationary long-

shoremen. From the many applicants, 742 men were selected. Plaintiffs were among that group (R. 754). In making his application for Class B status, each appellant in 1959 expressly acknowledged and agreed that:

> "Class B registration, if granted, shall be subject to agreements between the PMA and ILWU, or their successors, and to rules with respect to registration and deregistration established by said parties. . . ." (R. 4k)

Each applicant further agreed that he understood:

> ". . . [R]egistered longshoremen may be deregistered and . . . registration may be revoked in accordance with such agreements and such rules now in effect or hereafter to be agreed upon or adopted by the Association and the Union or their successors or by the Joint Port Labor Relations Committee". (R. 4k)

During the next few years the parties were carrying on precedent-making negotiations with respect to the industry's problem of needing to automate and to mechanize and the employes' problems of needing assurances of continued employment while operations were so modernized.[3] As a result, no men were advanced from the probationary status to full (Class A) registered status until 1963.

In the spring of 1963 the decision was made to advance the seniority of about 450 of the San Francisco probationary (Class B) longshoremen and so to give them fully registered (Class A) status. It was determined that all Class B men should be given the opportunity to file applications for Class A status and that those not qualifying under the agreed standards would be deregistered.

Notice of this opportunity was given and application

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3. Appellants demonstrate either a misunderstanding of or a disregard for this extensive undertaking. The modernization and mechanization fund, created as a result of collective bargaining, involved a contribution by PMA of 29 million dollars, not a mere 29 thousand dollars as erroneously indicated at page 18 of appellants' brief.

forms were made available (R. 755). All of the men then in Class B status, including appellants, applied to advance to Class A. Each in his application agreed that any complaints that he had regarding his application or his employment "will be handled under the grievance procedure set forth in the contract" and must be initiated within ten days of the publication or notice of the committee's action on the applications (R. 766). Each applicant also expressly acknowledged that his application and employment were governed by the ILWU-PMA contract and the registration rules in effect or "hereafter to be agreed upon or adopted by these parties or any Labor Relations Committee" (R. 766).

The joint union-employer committee reviewed the records it had as to the longshore work history of the applicants on the basis of the standards set forth in the 1963 Rules. On April 24, 1963, sixteen applicants were found to have failed to satisfy the standards, and they were removed from the Class B list and deregistered. On June 17, 1963, an additional 81 men were found to have failed to satisfy the standards, and they were also deregistered. Of the Class B men who applied for fully registered (Class A) status in 1963, 467 were found to have met the standards and they were given Class A status (R. 757).

Appellants are 51 of the 97 deregistered longshoremen (R. 757). The more relevant facts of the work records as to the appellants are summarized and appear in the record (R. 91q-91t). It is a lengthy list and we have reproduced it at page 23 of Appendix B to this brief. The list shows thirty-five of the 44 men were charged with violations of the low-man out rule; these totalled in excess of 603 hours dishonestly left out of the reports appellants submitted in getting dispatched to work. Forty-four men were charged with being late at least 365 times in making the

payments required of them under the collective bargaining contract for support of the dispatch hall. In addition, there were 5 suspensions for intoxication, 4 suspensions for refusing to work as directed, 3 suspensions for walking off the job, 6 reprimands for refusing to work as directed, and 11 probations for poor work availability.

Mr. Weir, alone of all the plaintiffs, filed an affidavit with the district court. He claims that the only reason he was deregistered was because of his activities opposing current leadership in the ILWU, his collective bargaining representative. He speaks of himself as the "leader and spokesman" of Class B men because he had been, to use his words, "unswerving in my defense of the rights and interests" of the "B" men (R. 313). He tells that because of his "leadership" of the Class B employes he "earned the enmity" of union and PMA officials and that he "gained their hostility" (R. 314). He tells how he opposed what was, in his opinion, a "short-sighted and ultimately defeating collective agreement" (R. 314). In this, he is referring to a modernization and mechnization plan under which the employers are contributing $29,000,000.00 for the benefit of longshoremen in return for the longshoremen waiving collective bargaining provisions that had theretofore barred automation of the industry on the Pacific Coast. He states that he had been told that his activities would bring down upon him the "wrath" of Harry Bridges and that he "would be deregistered at the first opportunity" because of his activities (R. 341).

D. Appellants' ineligibility for Class A seniority status was confirmed after hearings in grievance proceedings under the collective bargaining contract.

After the initial individual decisions were made on each of appellants' applications to advance to Class A status, each man was given notice and informed that he had an

opportunity to appear before the Joint Port Committee. Each appellant appearing was told of the matters in issue and was permitted to respond (R. 757-758). He was also told he could have a further hearing before a sub-committee of the Joint Port Committee to review the detailed facts on which the committee had acted in refusing his application (R. 757-758). In a few cases (none involving appellants) such hearings before the sub-committee brought to light errors in the facts in the particular cases and established that the men in question had indeed met the committee's standards; they were thereupon granted Class A status (R. 89-90).

In July 1963, when the respective decisions of the port committee to deregister each of the appellants became final, each man was informed of his right to file a grievance if he wished to attack the decision on the ground that there had been discrimination against him (R. 2). Each of the appellants herein filed a type-written grievance on July 27, 1963, in the following form (R. 2, 4L):

> "Dear Sirs:
>
> "Your committee de-registered me on June 17. On July 24, I received your letter denying my hearing appeal. In so doing you consummated an action that is discriminatory. You have not judged all the men involved by the same standards.
>
> "I appeal your decision and request another hearing as stipulated, where I will prove and document this discrimination.
>
> "I have never been able to get from you an official statement specifying the alleged charges against me, nor did your committee produce documents to substantiate the charges.
>
> "Would you please correct this situation for the next hearing."

As we shall discuss below, appellees were called upon during the ensuing period to defend unfair labor practice

charges brought by five Class B men who were deregistered at the same time as appellants.[4] During the same period, hearings were conducted on a large number of unemployment insurance claims filed by appellants herein and by others. Such hearings were held on November 6, 1963, and in 1964 on January 13, 15, 17, 20, February 3, 4, 5, 6, 7, March 2, 6, 30, 31, and April 1 (R. 198). The breaks in the hearing were principally due to collateral proceedings instituted by appellants' attorney (R. 759). The decision on the claims was not rendered until May 14, 1964 (R. 212).

The principal issue at the unemployment insurance hearings was not that of whether the man had or had not violated the standards for Class A registration but, rather, whether those violations, if any, would disqualify him for unemployment insurance under the peculiar tests set forth in the statute. The unemployment insurance issue could not be determined without a full investigation of the factual basis for the denial of full registration under the "1963 Rules". These factual questions were vigorously litigated by appellants' attorney and a full record resulted.

The transcript of the hearings became available to the Joint Port Committee in May, 1964 (R. 475); it was incorporated into the record of the committee when grievance hearings were commenced by that committee later that month (R. 90). The committee also ordered that this record be summarized in writing and made available to each of the appellants for assistance in preparing and presenting his case in the grievance-arbitration proceedings (R. 91v).

Further hearings on the grievances were held in October, 1964, after notice, and all appellants were given full oppor-

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4. The charges to which we refer were filed by the men on July 25, August 5, September 26, and December 2, 1963. After a field investigation, a complaint was issued by the San Francisco Regional Director on April 2, 1964 (R. 232).

tunity to present evidence to support, contradict, supplement and explain the summarized evidence and to argue the issues. The Joint Port Committee thereafter determined that each of the appellants had failed to meet the standards for Class A registration. Appellants were given a copy of the decision and were advised of their rights to appeal (R. 91a-91c).

Appellants' attorney addressed communications to the Joint Coast Committee. These were deemed to be an appeal from the ruling of the Joint Port Committee (R. 86). Counsel for appellants was informed that all men were invited to present their cases to the Joint Coast Committee at the designated time and place (R. 87, 91m). One man, Mr. Love, appeared at the Joint Coast Committee hearing. He was offered, but refused, the assistance of union counsel. He admitted that he failed to meet the standards to remain registered and limited his argument to an attack on the standards (R. 90-91).

The Joint Coast Committee, in its decision issued December 18, 1964, found that the registration standards comprising the "1963 Rules" had been applied fairly and uniformly and without discrimination and that each appellant failed to meet those standards (R. 86-91). Appellants' attorney was served with the decision the day it was rendered (R. 83). The Joint Coast Committee simultaneously gave notice (R. 84-85) to each grievor of his rights under Section 17.4 of the ILWU-PMA agreement (R. 4, page 69) permitting an appeal to the Coast Arbitrator and a review, by him, of the facts of the deregistration. The decision and order of the Joint Coast Committee (R. 86 et seq.) are reproduced as Appendix B to this brief.

It is uncontroverted that none of appellants or their attorney filed an appeal with the Coast Arbitrator (R. 83).

E. The NLRB has rejected any claim of unfair labor practices in the 1963 registration procedures.

Two sets of unfair labor practice charges were filed by the Class B longshoremen deregistered in 1963.

1. Appellants' charges of arguably unfair labor practices were untimely and were barred.

Most of the 51 appellants filed unfair labor practice charges against the union and against PMA on May 17, 1965, basing their charges on the very events and allegations contained in their complaint (R. 176-179). In their charge against PMA, they claimed:

> "1. On or about June 17, 1963, PACIFIC MARITIME ASSOCIATION and its member employers, in concert with INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION (INTERNATIONAL) AND ILWU LOCAL NO. 10, caused the charging parties to be deregistered as Class "B" longshoremen in the Port of San Francisco: to be denied employment opportunities through the union hiring hall: to be denied the opportunity to be registered as Class "A" longshoremen and to receive the benefits of Class "A" registration.
>
> "2. On or about November 20, 1964, the above actions taken against the charging parties became final by reason of a decision by the Joint Coast Labor Relations Committee after appeal thereto pursuant to the grievance procedure set forth in the collective bargaining agreement then in force and effect.
>
> "3. The actions taken by the PACIFIC MARITIME ASSOCIATION and the International Union and Local No. 10, were taken without cause, without prior notice of the cause or reason for said actions, and were the results of discrimination and treatment based upon irrelevant, invidious and unfair considerations. In addition, said actions were taken against the charging parties because of their nonmembership in the afore-

mentioned union, resulted in interfering, restraining and coercing them from exercising their rights guaranteed by Section 7 of the Act." (R. 178)

The charges were referred to an examiner for investigation (R. 177, 178b), and on June 21, 1965 the NLRB informed the charging appellants (R. 176a, 180b) that their charges of "acts which arguably constitute unfair labor practices" could not be litigated before the Board because they had been filed after the expiration of the applicable six-months period of limitations specified in § 10(b) of the Act, 29 U.S.C. § 160(b).

2. Unfair labor practice charges, filed by other Class B men, were heard by the NLRB and were found to be without substance.

As stated above, unfair labor practice charges were filed against appellees in mid-1963 by five Class B men who had been deregistered at the same time as appellants (R. 231). The charges were timely; a complaint was issued.

After lengthy hearings a decision, setting forth detailed findings and conclusions, was issued by the trial examiner on May 4, 1965 (R. 263). He found a breach of the duty of fair representation, arbitrary, irrelevant and invidious action, and unlawful discrimination (R. 256). An appeal was then taken to the National Labor Relations Board, which considered the trial examiner's finding and conclusions and reversed his decision. *Pacific Maritime Association and International Longshoremen's and Warehousemen's Union, Local 10* [*Johnson Lee*], 155 NLRB 117, 60 LRRM 1483 (1965). We have included the Board's ruling as Appendix A to this brief as it does not yet appear in bound volumes of the reports.

It was the ruling of the Board that the discharges involved neither a breach of the duty of fair representation nor discrimination nor any other activity prohibited by the Act. Although the matters complained of were arguably unfair labor practice charges, they could not be proved

because the Board held that the discharges (the deregistrations) were based on legitimate lawful standards adopted in good faith in the collective bargaining process, with the purpose of selecting the best longshoremen for full registration status.

F. Appellants have had repeated opportunities to state any claims they might have on which a federal court may grant relief.

The appeal before this Court relates to the dismissal with prejudice of appellants' fourth amended complaint.

1. The history of the earlier pleadings is significant background to the district court's order here involved.

(a) The original complaint was filed in April, 1964.

The original complaint in this matter, filed on April 15, 1964 (R. 540),[5] alleged a purported violation of the ILWU-PMA collective bargaining agreement and claimed federal jurisdiction under § 301 of the Labor Management Relations Act. It was a 55-page document describing the deregistration of appellants as being the result of "arbitrary" and "discriminatory" action by the union and PMA. The defendants joined in a motion to dismiss the complaint, for summary judgment and for a stay pending arbitration (R. 595). On July 21, 1964, Judge Wollenberg granted the request of appellants and other plaintiffs for leave to file an amended complaint (R. 600).

(b) The first amended complaint was filed in August, 1964.

The first amended complaint, again seeking to allege violation of a collective bargaining contract and claiming federal jurisdiction under § 301, was filed on August 12, 1964 (R. 601). It took 65 pages to allege the same material as

5. A supplemental record was filed including many of these documents. Therefore the pagination of the record on appeal is not always chronological.

that contained in the original complaint. Appellees' motion to strike (R. 667) was granted by Judge Weigel on October 27, 1964 (R. 681).

(c) The second amended complaint was filed in November, 1964.

The second amended complaint, again claiming § 301 jurisdiction on the same basis, was filed on November 4, 1964 (R. 683). While it is shorter, being 45 pages in length, it incorporated by reference about 20 pages of "declaration" by counsel. It was still unintelligible in stating the facts to establish federal jurisdiction or in stating any claim entitling plaintiffs to relief in the district court. Motions to dismiss were filed on November 16, 1964 by PMA and by the other defendants (R. 743, 745). On January 12, 1965, Judge Weigel dismissed this complaint. He held that it failed to satisfy Rule 8 of the Federal Rules of Civil Procedure in that it "is neither a short nor a plain statement of any claim". He ruled that the complaint was "redundant and ambigous" and prohibited effective discovery as "defense lawyers could not safely determine issues of relevancy and judges could not safely decide them" (R. 768-772).

(d) The third amended complaint was filed on January 26, 1965.

A third amended complaint was filed on January 26, 1965 (R. 7). It was much shorter than plaintiffs' previous efforts. The only charge of this complaint was that the defendant union and defendant employers association entered into an agreement to deprive plaintiffs of their "right to work" and some undefined "right" to become fully registered longshoremen (R. 9-10). Section 301 was again relied on to support the claim of federal jurisdiction.

Beginning in late March, 1965, there was a succession of motions, declarations and correspondence to the district

court from individual appellants indicating a desire to discharge their attorney, Mr. Gordon (R. 530-531). Formal motions to substitute Mr. Brunwasser, Mr. Thau and Mr. Heisler as counsel for appellants were granted on May 20, 1965 (R. 531). A motion to dismiss the third amended complaint was filed by the union on June 8, 1965 (R. 106a) and by PMA a day later (R. 93). Counsel for appellants in this appeal then appeared and moved to sever their clients' case from that of the four plaintiffs who had elected to remain with Mr. Gordon (R. 531). On July 21, 1965, the third amended complaint was dismissed by Judge Harris without leave to amend (R. 181).

(e) The fourth amended complaint was filed during the summer of 1965.

On June 21, 1965, a "fourth amended complaint" was sent, by counsel for appellants herein, to the office of the clerk of the district court (R. 533) and copies were given to counsel for appellees. Motions to dismiss the fourth amended complaint (R. 130, 138) were similarly sent to appellants' present counsel by appellees. On August 16, 1965, after a hearing and over the protest of Mr. Gordon, Judge Harris granted appellants' motion for severance, permitted the fourth amended complaint of appellants herein to be filed and then took under submission the motions to dismiss directed to it (R. 534).

2. The allegations of the fourth amended complaint are before this Court.

The introductory ten paragraphs of the first "cause of action"[6] of the fourth amended complaint (R. 109-111) are incorporated by reference into the other four causes of

6. Appellee asserts that none of the several counts of the complaint states a "cause of action" for which the district court could provide a remedy. Appellants label each count "cause of action"; we shall use the same terminology for the sake of simplicity.

action (¶¶ 34, 42, 51, 55). Paragraph 1 alleges jurisdiction under § 301, that is, federal jurisdiction based on a claim of violation of a collective bargaining contract. Paragraphs 2 through 9 describe the parties. Paragraph 10 states the existence of the ILWU-PMA collective bargaining contract. The other pertinent provisions of the several causes of action are summarized below.

(a) The first cause of action, based on the theory of Steele v. Louisville & Nashville R.R., asserts a breach of fiduciary duty in amending the contract in 1963.

The first cause of action is described by appellants (App. Br. 7) as based on the legal theory of *Steele v. Louisville & Nashville R.R.,* 323 U.S. 192 (1944). It alleges that the ILWU had a "fiduciary duty" to represent appellants "fairly without arbitrary or hostile purpose, action or intent" (App. Br. 7-8). The allegation is made that this duty was breached when the 1958 registration procedures, attached to the complaint as Exhibit A (R. 123), were amended in 1963 (App. Br. 8).

The alleged facts of this claimed "breach of duty" are described in generalities. It is alleged that rules in regard to "registration and deregistration" were adopted in 1958 as part of the ILWU-PMA collective bargaining contract (R. 111, ¶ 11) and that, by an amendment in 1963, "new rules"[7] were adopted governing the standards for advancing applicants in limited (Class B) registration status to full (Class A) registration status or deregistering them (R. 111, ¶ 12). It is alleged that appellants were Class B employes and had been for four years (R. 112, ¶ 17), that on or about June 17, 1963 the defendants "jointly decided" to act, pursuant to the 1963 rules, to advance certain longshoremen to Class A and to deregister others (R. 113, ¶¶ 20,

7. In their brief, appellants have called these "the 1963 Rules" and we adopt their designation.

21), that appellants had no opportunity to be heard concerning the adoption of the 1963 rules (R. 113, ¶ 21), and that these rules were arbitrary and unfair (R. 113-114; ¶ 21, ¶ 22 and first ¶ 23). The foregoing allegations of facts are followed by allegations of conclusions. It is alleged that the old rules, of 1958, continued to be in effect without change at the time that appellants were deregistered despite the adoption of the 1963 Rules (R. 114, second ¶ 23). It is further alleged that the ILWU and Local 10 "by their negotiation of the amended rules which were substantively arbitrary . . . violated their fiduciary obligations to the plaintiffs to represent them fairly . . .". (R. 115, ¶ 30). The only allegation against PMA is that by joining in the negotiation of the 1963 rules, it ". . . participated in the denial of the plaintiffs' rights to fair representation" (R. 116, ¶ 31).

(b) The second cause of action, again on the Steele theory, asserts a breach of the duty of fair representation in applying the contract's 1963 amendment.

The second cause of action is also described by appellants as being based on the legal theory of *Steele v. Louisville & Nashville R.R.,* supra, 323 U.S. 192 (App. Br. 8-9). It is alleged that the union defendants arbitrarily and unfairly *applied* the 1963 registration and deregistration rules with "hostile discrimination" (R. 117, ¶ 39). The only charge against PMA in the second cause of action is that by "joining with" ILWU and Local 10 in this application of the 1963 rules, PMA participated in denying appellants their right to fair representation in the administration of the collective agreement" (R. 117, ¶ 40).

(c) The third cause of action asserts that the discharges of appellants involved "hostile discrimination" and were in violation of the contract.

The third cause of action, described as being based on § 301 (29 U.S.C. 185), alleges that appellants have been

denied Class A registered status and have been deregistered "by a final decision made by the Joint Coast Labor Relations Committee . . ." (App. Br. 9; R. 118 ¶ 42, incorporating ¶ 24). It is alleged that this action was in violation of "the clear terms of the collective agreement" (R. 119; ¶ 46) and in violation of appellants' "individual rights" under the collective agreement (R. 119; ¶ 47). Again, by incorporating paragraphs of preceding causes of action, the suggestion is made that "hostile discrimination" was to some extent involved in the adoption or application of the 1963 rules.

(d) The fourth cause of action claims that a conspiracy of the individual defendants led to the breach of duty alleged in the first cause of action.

The allegations of the fourth cause of action relate to actions of the individual defendants, each of whom is alleged to be an officer or official of a union defendant. It is alleged that they conspired with each other and with other defendants to cause PMA and the union to "pursue the wrongful and unlawful course of conduct" complained of in the first cause of action and that, in so doing, they acted intentionally and with malice "to deprive the plaintiffs and each of them of their status as registered longshoremen and of their rights and privileges as such. . . ." The complaint demands punitive damages from those individuals (R. 120; ¶ 52, 53, 54).

(e) The fifth cause of action claims that a conspiracy of the individual defendants led to the breach of duty alleged in the second cause of action.

The allegations of the fifth cause of action assert a conspiracy among the individual defendants relating to the facts alleged in the second cause of action. Punitive damages are again demanded from those individuals (R. 120-121; ¶ 56, 57, 58).

(f) The prayer asks for ordinary damages for a violation of contract and also for declaratory judgment, injunctive relief, mandatory relief and punitive damages.

The prayer of the complaint seeks money damages and a wide variety of other relief. It contains a demand by each plaintiff for loss of earnings from June 17, 1963 and for costs of suit; and each plaintiff demands punitive damages of $100,000.00. The plaintiffs also seek a declaratory judgment of the rights and duties of the parties. They demand that defendant be enjoined from deregistering them. They demand an injunction against implementing the 1963 rules relating to registration and deregistration. They demand that defendants be ordered to reinstate them as Class B longshoremen, to register them as Class A longshoremen and to grant them all the rights and privileges of Class A longshoremen. They also demand that defendants be enjoined permanently "from in any manner whatsoever interfering with the future employment of plaintiffs as longshoremen in the Port of San Francisco" and that the ILWU and Local 10 be enjoined from "purporting to act as collective bargaining representatives of plaintiffs so long as the unlawful conduct complained of herein continues" (R. 121-122).

3. Appellants admit on this appeal that there has been no violation of the no-discrimination clause of the collective bargaining contract.

Contrary to their allegations in their grievances filed under the contract's grievance-arbitration procedure, appellants in this Court expressly deny that their complaint or their appeal is based on any purported violation by PMA or any other defendant of § 13.1 of the ILWU-PMA agreement (R. 4; page 54). Appellants expressly state in their opening brief (page 72) that:

> ". . . the complaint of these plaintiffs does not fall within the ambit of the quoted section [§ 13.1] of the

collective agreement. Their complaint of unfair representation does not fall within it. Their complaint of discrimination does not fall within it."

Appellants thus expressly deny that they are basing their complaint or this appeal on any theory of discrimination against them in the adoption or application of the standards of the 1963 rules on the basis of any type of discrimination covered by § 13.1, including discrimination based on:

1. their nonmembership in the union; or
2. any activity by them for the union; or
3. any activity by them against the union; or
4. absence of any activity by them for the union; or
5. absence of any activity by them against the union; or
6. their race; or
7. their creed; or
8. their color; or
9. their religious beliefs; or
10. their political beliefs.

4. The district court dismissed the fourth amended complaint and rendered summary judgment in favor of appellees.

The factual information set forth in this Statement of the Case is drawn from affidavits supplied the district court by the parties. In granting appellees' motions to dismiss the third amended complaint, Judge Harris stated that he had considered "all the declarations and affidavits presented by each side and particularly the affidavits of B. H. Goodenough and J. A. Robertson (R. 1, 82, 176, 749). His order dismissing the third amended complaint was, therefore, an order for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Judge Harris's order of October 8, 1965, dismissing the fourth amended complaint, recites the events by which the appellants herein were permitted to file that complaint. The order then continues:

> "In a formal order filed on July 20, 1965, this court stated the grounds for dismissing the Third Amended Complaint as follows: It appears to this court 'that it has no jurisdiction over the causes of action pleaded in the Third Amended Complaint, that exclusive jurisdiction over the alleged wrongful acts lies in the National Labor Relations Board, that this Court has no jurisdiction over the individually-named defendants, that it has no jurisdiction to issue the requested injunction due to the Norris-LaGuardia Act, that no breach of contract is or can be pleaded, that plaintiffs do not have standing to sue, that the applicable statute of limitations had expired prior to the filing of this action, and that plaintiffs, although given an opportunity to present their claim to an arbitrator, have failed and refused to do so. . . .'" (R. 501)

Summary judgment for appellees followed (R. 501-502).

The instant appeal by appellants is from the granting of this summary judgment. Timely notice of appeal was filed by appellants herein on November 2, 1965 (R. 505).[8]

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8. Mr. Gordon's clients filed a notice of appeal from the order dismissing the third amended complaint on August 2, 1965 (R. 534) and thereafter sought leave from this Court to file a petition for writ of mandamus and a stay of proceedings. The motions were denied on August 13, 1965. Mr. Gordon then sought leave to file a petition for writ of prohibition and this Court denied his request on September 7, 1965. On October 13, 1965, Justice Douglas denied a stay. The United States denied certiorari on January 17, 1966.

Mr. Gordon's clients had also filed a notice of appeal, directed to the fourth amended complaint, on November 5, 1965. On March 1, 1966, on motion of appellants herein, this Court dismissed their appeal. It declined to grant a stay on March 4, 1966. Mr. Gordon again filed a petition for certiorari, which the Supreme Court denied on October 10, 1966.

PMA has no knowledge of any activity by Mr. Gordon's clients to perfect their appeal from the order dismissing the third amended complaint. See, as to other proceedings, Appendix, p. 32.

SUMMARY OF ARGUMENT

Appellants were discharged from the probationary jobs they held as longshoremen in San Francisco when it was found, after some time in these jobs, that they did not meet the collective bargaining contract's standards to advance in seniority status to become part of the fully registered work force. Appellants asserted the contract was being violated and, as required by the contract, took their claims into the contract's grievance-arbitration procedure. The Joint Coast Committee decided that their discharges from probationary status were not contract violations. This decision was made by the contract parties, the union and the employer association, in the final joint step of the grievance-arbitration procedure. This is the last step short of submitting the question to the arbitrator. Although appellants clearly had the right to take their contract violation claims to the arbitrator, they chose not to exercise that right. Instead, by their fourth amended complaint they seek to set aside the administrative decisions that there was no contract violation.

This collateral attack in the federal court, appellants claim, is sustainable on one or both of two legal theories. One theory is that there was a breach of the duty of fair representation or "hostile discrimination" that permits review of the discharges. The other is that the contract was violated.

I. Appellants' first theory of their case is based on two propositions that have developed in Supreme Court decisions with respect to unions under the Railway Labor Act. First: a labor union, if it is acting as a bargaining representative exercising rights protected by federal labor law, must fairly represent all employes in the bargaining unit; it has a duty of fair representation. Second: if there is no administrative remedy to enforce this duty, the federal courts will provide a judicial remedy. These two propositions do not establish a cause of action or federal court

jurisdiction with respect to employes under the National Labor Relations Act. That Act provides a specific remedy for any discriminatory discharge of an employe resulting from a breach by the union of its duty of fair representation. There being no void to fill, this cause is governed by those opinions holding that the National Labor Relations Board's jurisdiction is exclusive and pre-empting.

Availability of the administrative remedy is also conclusively shown by the fact that appellants filed charges with the Labor Board raising the facts alleged herein. These were not litigated before the Board because they were not filed within the applicable time limitations. The courts do not provide a judicially established remedy for those who have failed to utilize the administrative remedy provided by statute.

What is more, the Labor Board has considered the specific claims of union-employer discrimination submitted by other men discharged under the same contract provisions and through the very same procedures and hearings that are attacked by appellants in the case before this Court. The Board held that there was no breach of the duty of fair representation in effecting these discharges.

II. Appellants' second theory is based on *Humphrey v. Moore.*

One necessary element of a *Humphrey v. Moore* contract violation cause of action is a showing that the union, in breach of its duty of fair representation, engaged in "hostile discrimination" in handling an employe's claim in the grievance-arbitration procedure. *Humphrey v. Moore* holds that a showing of such "hostile discrimination" will permit a court to disregard the normal finality of the administrative decision by the contract parties in the grievance-arbitration procedure and will permit the court to review and decide, itself, the substantive claim of contract violation.

The absence of any "hostile discrimination" is affirmatively shown. First, appellants specifically disclaim any discrimination of every type falling within this phrase. Second, there is no claim of procedural "hostile discrimination" at the Joint Coast Committee hearing. Third, while appellants allege some specific acts of "discrimination", they are not of the character necessary to open the door to judicial consideration of the substantive claim of the contract violation. One group of the facts reduces to a routine claim of substantive discrimination that is unlawful under the National Labor Relations Act, which is remediable only under the administrative procedures of that statute. The remaining facts add up simply to an example of the usual collective bargaining principle that seniority gives preference under the collective bargaining contract.

The other necessary element of a *Humphrey v. Moore* cause of action is a showing of a contract violation. Such a claim is predicated on § 301 of the Labor Management Relations Act of 1947, as amended, which gives jurisdiction to federal courts to hear claims of violations of collective bargaining contracts. Accordingly, an assertion of a violation of a specific contract clause is indispensable. Appellants can show no such violation; they can show only that the appellees followed and applied contract provisions that appellants might not have included in the contract if they had controlled the union. For this reason there is neither a § 301 cause of action nor federal jurisdiction.

There are other facts showing that appellants cannot establish the contract violation element of a *Humphrey v. Moore* cause of action. They do not have standing to sue on such a claim. Appellants were given the opportunity to litigate, with legal representation independent of the contract parties, all of their claims of contract violations in the grievance-arbitration procedure of the collective bargaining

contract. They used these procedures through the final union-employer joint committee step at the Joint Coast Committee, where a decision was rendered holding that their discharges were entirely proper under the contract. Appellants failed to exhaust the arbitration procedure when they decided not to exercise their right to take an appeal to the arbitrator from the Joint Coast Committee decision as permitted under the collective bargaining contract.

ARGUMENT

I. Summary judgment for appellees was proper as the district court had no jurisdiction to hear appellants' claims of a breach by the union of its duty of fair representation.

The first and second causes of action of appellants' fourth amended complaint are described by appellants at pages 7 and 8 of their brief as being based on an alleged breach by appellee unions of a duty to represent fairly the employes represented by them.[9] Appellants argue at length that there is such a duty. There is no serious doubt that the National Labor Relations Act imposes a statutory duty on a union to represent fairly all of the employees in its bargaining unit.[10] The issue in this Court is whether the district court had jurisdiction to hear such claims in view of the effective remedy and preempting jurisdiction of the National Labor Relations Board.

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9. Appellee Pacific Maritime Association was charged in these causes of action on the basis that it participated with the unions in denying plaintiffs' rights to fair representation. (R. 116, 117) Since the fourth and fifth causes are dependent on the basic legal issues in these first and second causes, the law we here present on the remedies for this breach of duty disposes of these four causes.

10. We suggest that appellants' lengthy discussions of Railway Labor Act cases to support an undenied proposition established by the National Labor Relations Act, and elaborated in Board and court opinions, infers their need to evade the fact that the Board now provides a remedy for all breaches of the duty to provide fair representation.

A. The opinions cited by appellants are not in point as they are based on a lack of administrative remedy.

Appellants begin the "Argument" in their brief with a 25 page discourse devoted almost entirely to the "*Steele* line of cases" arising under the Railway Labor Act. *Steele v. Louisville & Nashville R.R.,* supra, 323 U.S. 192 (1944), *Tunstall v. Brotherhood of Locomotive Firemen, etc.,* 323 U.S. 210, 213 (1944), *Brotherhood of Railroad Trainmen v. Howard,* 343 U.S. 768 (1952), *Conley v. Gibson,* 355 U.S. 41, 44 (1957), and *Gainey v. Brotherhood of Railway etc. Clerks,* 313 F. 2d 318, 322 (3 Cir. 1963). The cases upon which appellants put such heavy reliance are immediately distinguishable from the case at bar. All stand for proposition that the Railway Labor Act has no provision enabling an individual employe to seek or obtain administrative relief for hostile discrimination against him by the union having the federally sanctioned power to represent him in collective bargaining.

In the *Steele* case the Supreme Court discusses at length the wording of the Railway Labor Act and the failure of that Act to grant the Mediation Board or the Railroad Adjustment Board any effective authority to handle disputes between an employe and his collective bargaining representative. The Court noted the statutory inability of the Mediation Board to offer relief and stated that the Adjustment Board "could not give the entire relief here sought" and that it had "consistently declined in more than 400 cases to entertain grievance complaints by individual members of a craft represented by a labor organization" (323 U.S. at 205). The Court then held, "We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy" (323 U.S. at 206). The holding of the *Steele* line of cases is that the federal courts stand open to provide a remedy for breach

of the duty imposed by statute where there is no administrative remedy.

Appellants refer briefly to two cases involving the National Labor Relations Act, in which a judicial remedy was provided in the absence of an administrative remedy. The first, *Wallace v. Labor Board,* 323 U.S. 248 (1944), arose before the 1947 amendment ("Taft-Hartley"), a time when the Act included no specification of union unfair labor practices and no authority to impose effective sanctions against unions. The second, *Syres v. Oilworkers International Union,* 350 U.S. 892 (1955), arose in an unusual way and involved a refusal of Fifth Circuit courts to protect Negro employes from flagrant racial discrimination.

Syres and others, who were members of a totally segregated Negro local, filed a complaint against a totally segregated white local of their same union and against their employer. There was a contract between the two labor organizations requiring the white local to negotiate fairly on behalf of the Negro local. Plaintiffs charged that the white local, in violation of the contract, had used the collective bargaining process to reach an agreement with the employer under which the members of the Negro local would be denied any future promotion. Plaintiffs alleged that this discrimination was based solely on their race and was in violation of the contract between the two unions. The district court for the Eastern District of Texas dismissed the action. The Fifth Circuit affirmed, stating that all of the plaintiffs were members of the union "by their own voluntary consent" and that the matters of which they complained did not require an interpretation of the National Labor Relations Act or any other federal law but rested on a claim that in dealing with the issue of promotion the white local breached the agreement with the Negro local that it would protect the Negroes in the collective bargaining ne-

gotiations (223 F. 2d at 743).[11] The dismissal of the action was affirmed without any comment in the majority opinion on the defendants' contentions that the plaintiffs' only remedy was under the administrative machinery of the National Labor Relations Board.

Judge Rives dissented. His opinion states that discrimination based solely on racial grounds is an unfair labor practice under § 8 of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) and § 158(b)(3). It also states that this federal law imposes a duty of fair representation applicable to all employes in the bargaining unit. In this, Judge Rives was following the clear language of the Supreme Court in *Wallace v. Labor Board,* supra, 323 U.S. 248 (1944). He then turns to the matter of remedy and asks whether the National Labor Relations Board "in this case" could provide an adequate administrative remedy for discrimination "because of race or color" in violation of the duty of fair representation.

Citing *Steele v. Louisville R.R.,* supra, 323 U.S. 192 (1944) and *Brotherhood of Railway Trainmen v. Howard,* supra, 343 U.S. 768 (1952), the dissenting opinion states:

> "There are no adequate remedies available to appellants under the National Labor Relations Act or through the Board. . . . Nowhere is the Board given power to prevent discrimination because of race or color, except by very limited procedure which would afford no adequate remedy in this case.

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11. In view of the opinions of the Supreme Court since 1955 it is now clear that the Fifth Circuit majority opinion was in error in holding that federal law was not involved. Section 301 expressly grants district courts jurisdiction over ". . . suits for violation of contracts between . . . labor organizations . . . ." In 1955 there was serious disagreement among the circuits whether state or federal law was the applicable substantive contract law to be applied and exercised in § 301 jurisdiction. *Association v. Westinghouse Elec. Corp.*, 348 U.S. 437, 443-456 (1955). It is now well established that federal law applies. *Teamsters Union v. Lucas Flous Co.,* 369 U.S. 95, 102-104 (1962).

> ". . . There is . . . no administrative means by which the Negro members can secure adequate separate representation for the purposes of collective bargaining. Decertification by the Board would afford no remedy at all. The alleged discriminatory contract would remain in full force after any decertification."

The Supreme Court, in a memorandum opinion handed down only 69 days after the Fifth Circuit denied a rehearing, granted certiorari and set aside the actions of the lower courts, citing *Steele, Howard* and *Tunstall,* all of which held that the federal courts could provide a judicial remedy as federal law imposed a duty with no administrative remedy for its breach.

Since the decision in *Syres,* it has become indisputably clear that the NLRB is now providing the administrative remedy that Judge Rives found lacking in 1955. It has repeatedly been held that there is such an NLRB remedy for discrimination because of race. It is routine that there is an NLRB remedy for discrimination because of intra-union dissension.

1. *The Labor Board has jurisdiction to provide administrative relief for the discrimination here alleged.*

The courts have from time to time stated, in substance, that § 8 of the Act is designed "to allow workers to exercise freely the right to join unions, to be good, bad, or indifferent members, or to abstain from joining any union without imperiling their right to a livelihood." See *NLRB v. Bakery Workers Local 50,* 339 F. 2d 324, 328 (2 Cir. 1964), citing *Radio Officers Union v. NLRB,* 347 U.S. 17 (1954). This policy has repeatedly been followed by the Board and the courts. We shall discuss several cases.

In *NLRB v. Local 138 International Union of Operating Engineers,* 293 F. 2d 187 (2 Cir. 1961), the court considered an order of the Labor Board relating to a case involving

rival factions within the union. It stated, "[A] small number of determined members, perhaps ten of a total membership of some twelve hundred, whom we shall call, without implication, 'reformers' have waged an intensive campaign to overturn [the] local president . . . and other incumbent officers for what the reformers consider to be gross mismanagement and improper administration of union affairs." (293 F. 2d at 189). Other members of the union on several occasions refused to work with the "reformers". The reformers were threatened with denial of employment. A number of the reformers were denied use of the union's hiring hall. The reformers who had been denied use of the hall were able to obtain only occasional employment. The Board's order included numerous provisions directing the union to stop such activities and to permit the reformers to resume work and to continue to work in jobs covered by the union's contracts. The Board's order protecting the reformers occupies over seven pages of the Board's printed reports being found at pages 1411 through 1418 of 123 NLRB. The scope of this order, in fact, was so broad that the Court of Appeals determined it should be modified prior to enforcement. (See 293 F. 2d at 199.)

NLRB v. Bakery Workers Local 50, supra, 339 F. 2d 324 (2 Cir. 1964) involved a rather simple situation in which a worker, Fisher, was denied the seniority status to which he was entitled under the collective bargaining contract because of a union objection based on an apparently rather technical failure on his part in proceeding in accordance with certain general rules of the union. The trial examiner found, and the Board sustained his finding, that Fisher was denied his contractual seniority and, on this basis, that the refusal of employment by the employer was "a result not sanctioned by contract but indeed contrary to its provisions

governing loss of seniority" (143 NLRB at 237). On the ground that the act forbids discrimination "not only between union members and non-members or between good members and bad members but in all decisions which depend primarily upon union membership considerations" (339 F. 2d at 327) the court enforced the order requiring reinstatement of Fisher with full back pay.

In *Local 212, United Automobile Workers,* 128 NLRB 952 (1960), the Board dealt with a termination of employment with Chrysler Corporation of a man, Taylor, who had been provoked by a union representative into striking the first blow in a dispute with another employee so as to subject him to discharge under the company's regular procedures. The Board found that the fight was a pretext and that the union had sought to get Taylor off the company's employment rolls because he was "agitating" for the "Society of Skilled Trades", a rival of the Automobile Workers. A representative of the union told Taylor on one occasion when he was distributing the Society's literature, "You don't want to stick around here, do you. . . . We are going to throw you out of here if you don't stop passing out that Society's literature." The union was directed to advise Chrysler that it had no objection to the company's employing Taylor, to make Taylor whole for any loss of pay he may have suffered, to cease and desist from harassing adherents of the Society of Skilled Trades and to cease and desist from threatening them with loss of employment or physical violence if they engaged in activities on behalf of that Society. The order apparently was not taken to the courts.

A group of longshoremen, in the New York area, refused to pay certain amounts to a union official after the union had by majority vote agreed to make "a personal gift" to the union official. After the members of one gang of longshoremen refused to make the "gift", they were told that

they would "starve" and the union would "get rid of them". A Board order was entered directing the employer, among other things, to reinstate, with back pay, the employes who had been discharged because of the union's opposition to them. 116 NLRB 667. This order was enforced by the Court of Appeals for the Third Circuit. *NLRB v. Inparato Stevedoring Corp.,* 250 F. 2d 297 (3 Cir. 1957). (The ILWU does not represent longshoremen in the New York area.)

NLRB v. United States Steel Corp., 278 F. 2d 896, 898 (3 Cir. 1960) involved an employe who was a member of the union "who had been involved in disputes with officials of the local on the manner in which they conducted union affairs . . .". The Board found that he had been denied employment because of union opposition to him and concluded that unfair labor practices had been committed by the union and by the employer (122 NLRB at 1324, 1329, 1331). The court enforced the Board's order, stating:

> "The order for the most part was in the usual form. It directed reimbursement to Russell for any loss of pay he may have suffered during the short period in which it was found that he was discriminated against, and directed the union to withdraw its objections to his employment. It required the posting of the usual notices. While the cease and desist provisions forbidding discrimination went beyond the Morrisville plant of the respondent company, we do not think that there is adequate ground for complaint on this item." (278 F. 2d at 898-899.)

In *Local Union No. 12, Rubberworkers v. NLRB,* 368 F. 2d 12 (5 Cir. 1966) the court dealt with a collective bargaining contract that "appeared to provide for plantwide seniority without regard to race or sex" (368 F. 2d at 14). As a matter of fact Negro employes were consistently

passed over in favor of white employes with less seniority in regard to promotions, transfers, layoffs and recalls. Grievances had been filed by the Negroes and not processed by the union. The opinion states:

> "The facts of this controversy once again present the critical challenge of striking a meaningful balance, consistent with existing labor policy, between individual employee rights and the continued effectiveness of the collective bargaining process." (368 F.2d at 16.)

The opinion discusses in detail the cases involving "fair representation" and sustains the conclusion of the Board "that petitioner's breach of the duty of fair representation constitutes an unfair labor practice under § 8(b)(1)(A) of the Act" (368 F. 2d at 24).

2. The NLRB could provide a remedy for the wrongs set out in the conclusions appellants plead, if a timely charge had been filed and the allegations established.

Stanley Weir's affidavit states he was selected for discharge because he had vigorously and consistently opposed the established order of things within the ILWU. He refers to his repeated attacks on Harry Bridges and to his outspoken criticism of the contract amendments that Bridges was heralding as major gains for the longshoremen, but which Weir was vociferously assailing as invidious impositions on the men for whom he was speaking.

At this time, no contention can be made that appellants were without an administrative remedy for the alleged breach of duty of fair representation of which they complain herein. As discussed in our Statement of the Case, the National Labor Relations Board assumed jurisdiction over similar, if not identical, allegations filed by five men deregistered at the same time that appellants were deregistered. *Pacific Maritime Association and International Longshoremen's and Warehousemen's Union Local 10*

[*Johnson Lee*], 155 NLRB No. 117, 60 LRRM 1483 (1965). Hearings were held and the charges litigated. The trial examiner, in his findings as to the facts of the deregistration action, concluded there had been unfair labor practices on the legal theory the Act makes it an unfair labor practice to discharge an employe, or otherwise to discriminate against him, on the basis of irrelevant, invidious or unfair considerations, citing *Miranda Fuel Co., Inc.,* 125 NLRB 454. His decision provided for an order that the union and the association (1) reinstate with back pay those he concluded were victims of a breach of the duty of fair representation and (2) cease and desist from any discrimination in breach of this duty. However, the Board *reversed his decision on the facts,* finding there was no breach of this duty. Thus, while agreeing with his position as to the substantive law and the available remedy, it concluded that appellees had in no way committed unfair labor practices in deregistering appellants' co-workers.

Indeed, appellants themselves have recognized that the Labor Board provides a remedy for the conduct they complain of in this appeal. They filed unfair labor practice charges against both PMA and the union alleging NLRB jurisdiction. The charges against PMA and the ILWU (R. 178, 179) alleged that § 8(a)(1)(A), 29 U.S.C. 158 (a)(1)(A), and § 8(b)(2), 29 U.S.C. 158(b)(2), were violated. They stated:

> ". . . [The discharges] were the results of discrimination and treatment based upon irrelevant, invidious and unfair considerations. In addition, said actions were taken against the charging parties because of their nonmembership in respondent union, and resulted in interfering, restraining and coercing them in the exercise of their rights guaranteed by Section 7 of the Act." (R. 178)

These charges were investigated by the San Francisco regional office of the Board. Thereafter, the Regional Director responded (R. 232) that he was refusing to issue the complaint as more than six months had elapsed "after the commission of the acts which arguably constitute unfair labor practices".

3. The Steele line of cases will not support a judicial collateral attack on a grievance decision on grounds for which the NLRB gives an administrative remedy.

The cases cited above, few of the many reported, establish that there is an administrative remedy for "hostile discrimination" or any breach of the duty of fair representation by a union subject to the National Labor Relations Act. This fact establishes that the cases relied upon by appellants to support their first, second, fourth, and fifth causes of action are not in point. The summary judgment for appellees on these causes must necessarily be sustained.

B. There is no court jurisdiction over claims asserting only a breach of the duty of fair representation or other unfair labor practices under the National Labor Relations Act.

The NLRB has primary jurisdiction to hear all charges that assert, even arguably, unfair labor practices as defined in §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158. With only one exception (discussed in section II below) the statutory jurisdiction of the Board is exclusive and pre-empting. The leading case defining this doctrine of pre-emption is *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244-245 (1959). The *Garmon* rule has been applied consistently by the United States Supreme Court. *Plumbers, Steamfitters, etc. v. County of Door,* 359 U.S. 354 (1959); *Marine Engineers Beneficial Association v. Interlake S.S. Co.,* 370 U.S. 173, 174, 176-177

(1962); *International Association of Bridge, etc. Workers v. Perko,* 373 U.S. 701, 706 (1963); *Hattiesburg Building & Trades Council v. Broome,* 377 U.S. 126, 127 (1964).

Appellants assert that they were deregistered and denied the advance to Class A seniority status, requested by the applications they filed, because the ILWU preferred other applicants for irrelevant, invidious and unfair considerations (App. Br. 17-19). They assert they are victims of discrimination in regard to their employment status as longshoremen because one of them, Weir, criticized the ILWU, Harry Bridges, and the contract permitting the mechanization and modernization of cargo handling on the Pacific Coast waterfront (App. Br. 18; R. 331-339), and others of appellants were his sympathizers (R. 331). Appellees agree that discrimination against a group of dissenters in the bargaining unit - whether they be good, bad or indifferent union members or non-members - is a violation of the National Labor Relations Act. Appellants have so asserted in their charge filed with the NLRB (R. 178). The only forum that can hear these claims is the National Labor Relations Board.

1. This Court has ruled that the subject matter of this lawsuit is within the exclusive jurisdiction of the NLRB.

This Court in *Alexander v. Pacific Maritime Association,* 314 F. 2d 690 (9 Cir. 1963), expressly recognized the preempting authority of the National Labor Relations Board to consider and determine charges that were remarkably similar to those in the instant case. In *Alexander* it was alleged that the plaintiffs there (ship clerks) had been denied registered status through arbitrary action of the ILWU and the PMA favoring union members, that contract provisions had been negotiated to discriminate in favor of union members, and that the union and the employers had complied with

these contract provisions so that preferential treatment in registration was given favored applicants with less experience in the industry than the plaintiffs because they were in better graces with the union (314 F. 2d at 693-694). This Court stated:

> "Many of the cases cited [by plaintiffs] arose under the Railway Labor Act, which makes no provision for administrative means for correcting breaches of duty of fair representation. The remaining cases cited involved acts of discrimination which were not, even arguably, unfair labor practices under the National Labor Relations Act . . . While resort to the federal courts was proper under those circumstances, it would be improper here in the face of the competance of the National Labor Relations Board to handle the alleged discrimination." (314 F. 2d at 692; portion in brackets supplied.)

2. *Other courts have similarly held that the subject matter of this lawsuit is within the exclusive jurisdiction of the NLRB.*

The lead of this Court in *Alexander* was followed by the Eighth Circuit in a recent opinion, *Woody v. Sterling Aluminum Products, Inc.,* 365 F. 2d 448 (8 Cir. 1966). The complaint in *Woody* is remarkably similar to the charges of the first and fourth cause of action here, which assert that the union in conspiracy with PMA breached its duty of fair representation by negotiating the 1963 amendment to the collective bargaining contract, the 1963 Rules by which registration standards were made effective. In *Woody,* it was charged that there was a conspiracy between the union and the employer in collective bargaining negotiations and that the parties bargained in bad faith to plaintiffs' detriment because the union failed to represent plaintiffs fairly and honestly (365 F. 2d at 456).

The Eighth Circuit affirmed the dismissal of the complaint holding that it was not within the jurisdiction of the district court because the charges made were within the exclusive jurisdiction of the Labor Board (365 F. 2d at 456). The same result had been reached in other cases, which with the cases cited above are discussed in more detail below. *Chasis v. Progress Mfg. Co.,* 256 F. Supp. 747 (E.D. Pa. 1966); *Adams v. Budd Company,* 349 F. 2d 368 (3 Cir. 1965); *Beausoleil v. Furniture Workers,* .... N.H. ...., 64 LRRM 2174 (1966); *Barunica v. United Hatters,* 321 F. 2d 764 (8 Cir. 1963); *International Longshoremen's and Warehousemen's Union v. Kuntz,* 334 F. 2d 165 (9 Cir. 1964); *See v. Local 417,* 64 LRRM 2224 (E.D. Mich. 1967). Also see *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965).

3. The Alexander decision has not been overruled or limited.

Despite the fact that this court's opinion in *Alexander has* been approved and applied by several courts in the cases cited above, appellants assert "that the holding of *Alexander* concerning jurisdiction of the National Labor Relations Board is no longer valid in light of the subsequent decisions in *Humphrey v. Moore* and *ILWU v. Kuntz*" (App. Br. 55). This assertion is made at the end of the section of their brief discussing these cases and *Hardcastle v. Western Greyhound Lines,* 303 F. 2d 182 (9 Cir. 1962) cert. den., 371 U.S. 920 and *Ford Motor Co. v. Huffman,* 345 U.S. 330 (1953). The assertion is wrong.

The basic holding of *Alexander,* supra, is that the National Labor Relations Board has exclusive jurisdiction over any claim of breach of the duty of fair representation in the negotiation of a collective bargaining contract or in amending such a contract. The opinion recognizes, however, that the federal courts do have jurisdiction where

alleged conduct constitutes a violation of the collective bargaining contract even though that same conduct is a violation of the National Labor Relations Act because it constitutes a breach of the duty of fair representation. This is the reason why this Court, in *Alexander,* sent the case back to the district court to permit plaintiffs an opportunity to amend their pleadings to allege a breach of contract.

The *Kuntz* case in no way suggests that the federal courts have jurisdiction over a claimed breach of the duty of fair representation unless it is allegedly the cause of a specific violation of a collective bargaining agreement. In fact, the plaintiffs in *Kuntz* asserted that their action was a suit for breach of contract under § 301, and so different from *Huffman* and *Hardcastle* (334 F. 2d at 170). The plaintiffs in *Kuntz* argued that the amendment of the pre-existing contract to change their rights under that contract was a breach of contract under § 301. This Court rejected this contention that a contract amendment was a violation of "vested" contract rights and so litigable under § 301. It then went on to hold that there could not be any possible basis for setting aside an amendment to a collective bargaining contract unless there was a "bad faith motive, an intent to hostilely discriminate" (334 F. 2d at 171). However, the opinion in no sense suggests that the only showing necessary for courts to set aside a collective bargaining contract amendment is a showing that there has been a breach of duty of fair representation. The opinion does not state what will establish a cause of action; it merely holds that plaintiffs did not state a cause of action by what they presented.

This Court earlier considered a similar type of question and disposed of it on the preliminary point of the specificity necessary in pleading a breach of the duty of fair representation. *Hardcastle v. Western Greyhound Lines,*

supra, 303 F. 2d 182 (9 Cir. 1962) cert. den. 371 U.S. 920. The opinion sustained the summary judgment granted by the district court, holding that a cause of action was not stated by allegations that a new seniority clause "arbitrarily, unfairly and capriciously" took away the seniority that the plaintiffs had under the superseded seniority clause. The opinion states (303 F. 2d at 187), "The appellants herein have done nothing more than present facts showing a dissatisfaction with a result adopted by a majority of the union of which appellants are members." This Court, in sustaining the summary judgment dismissing the complaint, does not hold that plaintiffs would state a cause of action upon which the federal courts may grant relief if the specified defects had not been involved. All this Court did was to point out some areas where plaintiffs' case was fatally defective.

The Supreme Court's opinion in *Humphrey v. Moore,* supra, 375 U.S. 335 (1964), in no way suggests that *Alexander* has been overruled. In fact, the *Humphrey* opinion directly accords with this Court's opinion in *Alexander.* The Supreme Court held there was § 301 jurisdiction in *Humphrey* because there were allegations of violation of specific language in the collective bargaining contract there involved. The Court stated that relief could have been granted had the plaintiffs established that there was a breach of the duty of fair representation in carrying on the grievance procedure and that the resulting grievance decision was a violation of the collective bargaining contract. In *Alexander,* this Court took the entirely consistent position that a cause of action under § 301 was not shown simply by allegations of a breach of the duty of fair representation.

The opinion of the United States Supreme Court in *Ford Motor Co. v. Huffman,* supra, 345 U.S. 330 (1953)

does not indicate that the Supreme Court has ever held that the federal courts will hear issues as to the duties of fair representation applicable to unions acting under the National Labor Relations Act *where there is no other substantive federal law basis* for federal court jurisdiction of the issues being litigated. Federal jurisdiction in *Huffman* was based on the claim that a 1946 modification of the collective bargaining contract at Ford Motor Company "violated his rights, and those of each member of his class, under the Selective Service Act of 1940. . . ." (345 U.S. at 332). A somewhat similar issue had previously been before the Supreme Court in *Aeronautical Industrial District Lodge 727 v. Campbell,* 337 U.S. 520, 529 (1949). The Court's opinion in that case states:

> "Of course, the Selective Service Act restricts a readjustment of seniority rights during the veteran's absence to the disadvantage of the veteran. But it would be an undue restriction of the process of collective bargaining (without compensating gain to the veteran) to forbid changes in collective bargaining arrangements which secure a fixed tenure for union chairmen, whereby veterans as well as nonveterans are benefited by promoting greater protection of their rights and smoother operation of labor-management relations.
>
> "All this presupposes, obviously, that an agreement containing the 1945 provisions expresses honest desires for the protection of the interests of all members of the union and is not a skillful device of hostility to veterans."

In light of the then existing law, just quoted, the *Huffman* opinion discusses in detail the nature of collective bargaining under the National Labor Relations Act, the authority of the collective bargaining representative under that Act, the need of the representative to have a wide range of reasonableness in seeking to come to an appro-

priate resolution of the inevitable differences arising in "the manner and the degree to which the terms of any negotiated agreement affect individual employees and classes of employees" (345 U.S. at 338), and the general nature of seniority. It concluded (345 U.S. at 333), that the International, as collective bargaining representative, had the authority to negotiate and agree to the provision attacked by Huffman and accordingly affirmed the district court's summary judgment dismissing the action.

In the course of the opinion (345 U.S. at 332, foonote 4) the Court considered the contention, first raised in the Supreme Court, that the Labor Board had exclusive jurisdiction with respect to the claim that the union had engaged in hostile discrimination or had failed to act in complete good faith and honesty of purpose in the exercise of its discretion in negotiating the seniority clause. In the footnote, the Court disposed of this argument saying, "Our decision interprets the statutory authority of a collective bargaining representative to have such breadth that it removes all ground for a substantial charge that the International, by exceeding its authority, committed an unfair labor practice." It then referred to the "somewhat comparable question considered in connection with the Railway Labor Act" in *Tunstall v. Brotherhood of Locomotive Firemen,* supra, 323 U.S. 210 and *Steele v. Louisville & Nashville R.R.,* supra, 323 U.S. 192, 204-207. The thrust of the entire opinion asserts that the federal courts will determine whether the collective bargaining clause under attack is a valid clause adopted without breach of the duty of fair representation where this is necessary in carrying out the court's jurisdiction to decide a case properly before it with respect to the seniority status of a man returning from military service.

The federal courts must decide this issue; the courts could not send it to the Labor Board.

Alexander was correctly decided. It continues to state the law.

4. *The prayer of the complaint asks the court to usurp powers that Congress has found require the expertise of the Labor Board for their proper exercise.*

The prayer of the complaint (R. 121-122) goes far beyond seeking damages for contract violation; it demands forms of relief that the NLRB usually grants in the exercise of its exclusive jurisdiction. First, the prayer asks for an order (of a sort consistently and appropriately given by the NLRB) requiring (a) that appellants be reinstated with back pay, and (b) that they be treated without any further "discrimination" (R. 122). Section 10 of the National Labor Relations Act authorizes this type of relief when the board finds it will effectuate the policies of the Act. Second, the prayer asks the court to declare invalid the contract provisions setting out the 1963 promotion standards adopted by the union and PMA in collective bargaining (R. 121); thus they obviously ask the federal court to find that the parties did not bargain collectively in accordance with the Act's requirements and to conclude the requested remedy would effectuate the policies of the Act. Third, it also asks for an order to enjoin the union and the employers from carrying on their ordinary collective bargaining with respect to appellants' registration (R. 121), although such bargaining is required by the National Labor Relations Act in the absence of some Labor Board order changing the ordinary requirements of the law. Fourth, the prayer asks the court to enter another order of a sort entered by the Labor Board, but only rarely because it has such

a drastic effect on the ordinary conduct of the collective bargaining required by the Act; it asks the court to enjoin the union from acting as a collective bargaining representative of employes within the bargaining unit so long as it continues the activities of which appellants complain (R. 122). Fifth, it further asks for a broad order enjoining appellants from "in any manner whatsoever interfering with the future employment of plaintiffs" (R. 122). This would prevent the employers from discharging appellants for good cause; it would prevent the union from agreeing that a discharge of an appellant was proper. It would preclude the union and the employers from conducting the ordinary day-to-day work of processing collecting bargaining grievances that might arise with respect to appellants' performance of their work.

The foregoing establishes, we submit, that appellants' prayer for relief verifies our position that if appellants have a cause of action at all, it is one over which the NLRB has exclusive jurisdiction. The prayer asks the court to invade the heart of the Board's jurisdiction and to substitute its judgment for the Board's expertise. The prayer raises issues that are of such delicacy in the field of collective bargaining that they must be retained within the exclusive jurisdiction of the Board. It alone has the peculiar experience to determine which of the remedies here sought would, in the proper situation, effectuate the policies of the Act. The Supreme Court in *San Diego Building Trades Council v. Garmon,* supra, 359 U.S. 236, 240-243 (1959), discusses at length the expertise of the Labor Board and its exclusive jurisdiction. It then quotes from *Garner v. Teamsters, C & H Local Union,* 346 U.S. 485, 491, on the role of the Labor Board in administering the National Labor Relations Act:

"Congress did not merely lay down a substantive rule of law to be endorsed by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules or substantive law. . ."

II. Summary judgment for appellees was proper as the district court had no jurisdiction under the purported § 301 claims because of appellants' failure to establish the necessary prerequisites for such a cause of action.

A statutory exception to the *Garmon* rule (of exclusive NLRB jurisdiction over unfair labor practices is found in § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). Appellants rely on this section to support federal jurisdiction as to the third cause of action (App. Br. 9).

A. Only suits for violation of contracts between a union and an employer or between unions are within the § 301 jurisdiction relied on by appellants.

Section 301 jurisdiction requires allegations of a violation of some right arising out of a collective bargaining contract. The purpose of § 301 is to give a court remedy to anyone injured by a violation of such a contract. This is implicit in the cases that have considered the scope of § 301 jurisdiction.

1. Smith v. Evening News Association.

In *Smith v. Evening News Association,* 371 U.S. 195 (1962) plaintiff alleged facts to show that the applicable collective bargaining contract contained an express provision that the employer would not discriminate against any employe because of his membership in the union. He then alleged facts to show that during a period when his employer was not operating because of a strike non-union employes were permitted to report to work and collect full wages while he had been refused the same privilege when he reported, ready and willing to work (371 U.S. at 196). The Supreme Court held that he had the right, under § 301, to have the district court hear his claim, which the Court characterized as one to "vindicate individual employee rights arising from a collective bargaining contract" (371 U.S. at 200).

The significance of *Smith v. Evening News Association* is twofold. First, if an individual employe is to invoke district court jurisdiction under § 301, he must be able to allege violation of a right "arising from [his] collective bargaining contract". Second, he must be able to establish his standing to sue by illustrating that the right involved is an "individual employee right" and one that is *individual and personal* to him. We shall demonstrate that appellants have not and can not satisfy either of these prerequisites and that there is, therefore, no jurisdiction in the district court to consider their complaint. Furthermore the Court recognized that it would have to resolve the issues should a conflict between court and administrative jurisdiction arise in handling facts that were both a contract violation and an unfair labor practice under the Act (371 U.S. at 197-198 n. 6).

2. Humphrey v. Moore.

Humphrey v. Moore, 375 U.S. 335 (1964) involved two companies ("E & L" and "Dealers") that had operated in the same geographic area. They agreed to split the area between them and each agreed to retire from the other's now exclusive area and to this end, to transfer facilities back and forth. A dispute arose among the employes of the two employers as to who should be laid-off and who should continue to work.

The employes of both companies were represented by the same union and had similar or identical collective bargaining contracts. The contracts contained identical provisions regarding the employes' seniority rights. E & L was the older company, and its employes generally had greater seniority than those at Dealers; any dovetailing of the seniority lists would mean a displacement of many of Dealers' employes. Both contracts also included an identical clause, § 5, regarding the resolution of disputes arising out of mergers or absorptions. The grievance procedure was also the same in both collective bargaining contracts. It provided for referral first to a local joint union-employers committee and, next, to a Joint Conference Committee in Detroit. The decision of the Joint Conference Committee was to be binding unless it could not agree on a decision. In that event, the dispute was to be submitted to arbitration.

The seniority dispute was referred to the local committee. It did not settle it. It was then referred to the Joint Conference Committee, where it was decided that the seniority lists be dovetailed. Many of Dealers' employes (including plaintiff Moore) lost their jobs under this decision.

Moore, acting for himself and all others in his situation, filed a complaint in the Kentucky state court seeking an

order retaining Dealers' employes in their jobs. *There were allegations of a hostile, false, deceitful, conniving, dishonest breach of the duty of fair representation in the conduct of the grievance procedure before the Joint Conference Committee.* Moore alleged that the local union president had told Dealers' employes that they had nothing to worry about and had thus lulled them into a false sense of security. He contended that, as a result, they were denied the opportunity of making their contentions fully known to the Joint Conference Committee in its consideration of the grievance. He also alleged that the union president had purposely deadlocked the local committee in order to effect this discrimination against the Dealers employes. There were further detailed allegations of "false and deceitful" action, of "connivance", and of "dishonest union conduct in breach of its duty of fair representation" in the Joint Conference Committee proceedings. There were allegations that the employes were deprived of a Joint Conference Committee hearing by the acts of the local union president (1) in espousing the cause of rival group within the union after having deceitfully connived against plaintiffs and (2) in deceiving the Dealers employes by indicating that the union would support their cause in the grievance procedure. *There were allegations of a violation of § 5 of the contract.* The pleadings asserted that the decision of the Joint Conference Committee, which changed plaintiffs' seniority standing so that they would be discharged, was the result of an incorrect interpretation and application of the collective bargaining contract in that § 5 precluded dovetailing of seniority in the circumstances.

The Kentucky trial court denied the injunction sought by Moore, but the Kentucky Court of Appeals reversed and granted it. It held, in effect, that the Joint Conference Committee violated § 5 of the contract when it decided the grievance by ordering dovetailing of seniority on the ground that

the change in the operation of the companies was not a merger or absorption that would give the Joint Conference Committee jurisdiction under § 5. On this basis, it held the administrative decision modifying the Dealers seniority list to be in violation of the contract. Certiorari was granted.

The Supreme Court majority opinion holds that judicial relief could be granted *if* the Joint Conference Committee had erred in changing seniority status so as to affect jobs, and *if* the change was arbitrary or capricious, and *if* the Joint Conference Committee procedure had been poisoned by the union's breach of its duty of representation in handling the seniority issue in the grievance proceeding at the Joint Conference Committee level. The Court held that Moore had sufficiently pleaded that his contract rights had been violated and had pleaded that this contract violation had occurred as a result of union activity in the administration of the grievance procedure that was in breach of his right to and its duty of fair representation. Therefore, the Court concluded, Moore had standing to sue, the court was not bound by the Joint Conference Committee decision if Moore established the breach of the duty of fair representation pleaded, and the court could itself then determine whether the jurisdictional fact under § 5 of a merger or absorption had been established.[12]

No suggestion is made in Humphrey v. Moore that a mere charge of "unfair representation" in the abstract, a charge unrelated to the conduct of the hearing leading to the decision under the grievance-arbitration procedure of the collective bargaining contract that is under attack, *is sufficient to allow a court to decide the meaning of the contract in an*

12. The Court thereupon reviewed the allegations in the light of the union's right and need to take actions that may affect some employes adversely, while benefiting others. It reversed the Kentucky Court of Appeals decision and affirmed the trial court's action dismissing the complaint.

action under § 301. Furthermore, there must be a violation of an individual and personal right. The third cause of action fails to meet these requirements of *Humphrey v. Moore.*

3. Alexander v. Pacific Maritime Association.

This Court considered the subject of § 301 jurisdiction in *Alexander v. Pacific Maritime Association,* 314 F. 2d (9 Cir. 1963), cert. den., 379 U.S. 882. Indeed, as we have shown in detail at pages 42-49 above, the *Alexander* complaint was remarkably similar to that in the instant case. This Court, after considering the December, 1962, Supreme Court decision in *Smith v. Evening News Association,* which came down after the appeal in *Alexander* had been filed in this Court, concluded:

> "The question is whether the alleged acts of discrimination constitute a breach of the collective bargaining agreement as well as an unfair labor practice under the [National Labor Relations] Act. *In our view, they do not.*" (314 F. 2d at 694; emphasis supplied.)

This Court should affirm the dismissal of appellants' complaint just as it affirmed the dismissal of the *Alexander* complaint. This complaint, like the *Alexander* complaint, alleges no violation of any right arising out of the collective bargaining contract. While a no-discrimination clause now appears in the ILWU-PMA Agreement as § 13.1, appellants expressly state at page 72 of their brief that neither their complaint nor their appeal is based on any alleged breach of this section.

4. Woody v. Sterling Aluminum Products, Inc.

Woody v. Sterling Aluminum Products, Inc., supra, 365 F. 2d 448 (8 Cir. 1966), also concerned claims of unfair representation in the negotiation of the collective bar-

gaining contract. The court ruled that such claims did not state a cause of action for breach of contract under § 301:

> "Our remaining jurisdictional issue concerns those allegations in Count I, charging the Union with conspiring and colluding with Sterling, bargaining in bad faith to plaintiffs' detriment, and failing to represent plaintiffs fairly and honestly. The District Court held that the plaintiffs' charges of the Union's bad faith in negotiating the collective bargaining agreement were not predicated upon the collective bargaining agreement so as to give the court jurisdiction under § 301, but rather looked beyond the agreement to the exclusive bargaining representatives' obligation of fair representation and was within the exclusive jurisdiction of the National Labor Relations Board."

The court then considered the claim that *Moore* would support court jurisdiction under § 301. The critical distinction was stated:

> "Unlike Moore, however, plaintiffs' allegations here are not contract oriented and not, therefore, 'within the cognizance of federal and state courts.'"

In conclusion the court stated (365 F.2d at 457), "[T]o rule jurisdiction might well jeopardize the whole concept of collective bargaining as we know it."

5. Chasis v. Progress Mfg. Co.

In another 1966 opinion, Chief Judge Clary of the Eastern District of Pennsylvania dismissed a complaint, like appellants' herein, alleging hostile discrimination. *Chasis v. Progress Mfg. Co.,* 256 F.Supp. 747 (E.D. Pa. 1966). After reviewing the history of § 301 jurisdiction since *Humphrey v. Moore,* he ruled that such charges, unless they can be related to a violation of a specific provision of the collective bargaining contract, do not support jurisdiction under § 301 but are, at best, mere charges of unfair labor practices within the exclusive jurisdiction of the NLRB.

6. Adams v. Budd Company

The complaint in *Adams v. Budd Company, et al.,* 349 F. 2d 368 (3 Cir. 1965) spoke of arbitrary, capricious, malicious acts of the company and union. It charged conspiracy and collusion to defraud plaintiffs and others similarly situated of their "vested rights". It was further charged that the union breached its duty of fair representation (349 F. 2d at 369).

The defendant union argued that the claim was not based on *violation* of the collective bargaining contract but "solely upon the adverse affect upon plaintiffs of the *negotiation* of such an agreement" and, as such, it was not a claim properly within the district court's § 301 jurisdiction. The Court of Appeals for the Third Circuit held that the union's contention was well-taken:

> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a labor contract of rights which they assert were independently, and pre-agreement, vested in them by their 'contract of hire'." (349 F. 2d at 370; emphasis the court's.)

7. Barunica v. United Hatters.

In *Barunica v. United Hatters, etc.,* 321 F. 2d 764 (8 Cir. 1963), the plaintiff claimed that she was a member in good standing of the defendant union, was qualified and able-bodied and willing to work at her trade, but that the union had refused to refer her out to employment and had deprived her of her equal rights. It is alleged that the union had deprived her of earning a living and in doing so had acted with malice. Upon considering possible § 301 jurisdiction and after referring specifically to the Supreme Court's opinion in *Smith v. Evening News Association,* the court ruled that there was

no § 301 jurisdiction. It held the complaint set out a "routine allegation of an unfair labor practice" within the exclusive jurisdiction of the NLRB and affirmed the judgment of dismissal (321 F. 2d at 766).

8. International Longshoremen's & Warehousemen's Union v. Kuntz.

In *International Longshoremen's & Warehousemen's Union v. Kuntz,* 334 F. 2d 165 (9 Cir. 1964), the plaintiffs claimed that the federal court had § 301 jurisdiction because there was a breach of the collective bargaining contract. They said there was a breach in that the pre-existing contract was amended so as to strip them "of a 'a vested right', namely a preferred seniority status previously granted by the defendants". Plaintiffs argued that § 301 invoked traditional contract law so that the amendment of the contract was a breach of the pre-existing contract. After quoting from *J. I. Case Co. v. NLRB,* 321 U.S. 332 at 336 (1944), this Court held that "traditional contract law" would not apply so as to permit an employe covered by the contract to assert that its amendment was a breach of the contract.

9. Appellants have not shown a violation of the collective bargaining contract.

Five motions to dismiss their complaints have afforded appellants opportunity to specify the clause of the ILWU-PMA collective bargaining agreement that they contend has been breached. They have never been able to give an answer. Rather, they attempt to cloud the issue by equating their statutory remedies with remedies afforded under totally different statutes. They have not, and they cannot, identify any clause of the collective bargaining contract that they allege has been breached. For this reason, inter alia, their complaint was properly dismissed.

B. Where a § 301 action attacks a decision in the grievance procedure under a collective bargaining contract, the plaintiffs must allege that there has been "hostile discrimination" in the grievance procedure that has led to a grievance decision violating the contract.

The third cause of action is based on *Humphrey v. Moore,* supra, 375 U.S. 335 (App. Br. 61). We have analyzed this case in detail at pages 53-56 above. There we show that the Supreme Court holds that a § 301 action may set aside a decision in the grievance procedure of a collective bargaining contract if it is both a violation of the existing contract and a product of "hostile discrimination". This means, as a corollary, that where a decision is reached in the contract grievance procedure in which the union has satisfied its duty of fair representation of the individual employes involved, the grievance procedure decision is a final decision as to any issue of contract violation. It is one that will not be reviewed in the courts under § 301. *General Drivers Union v. Riss & Co.,* 372 U.S. 517, 519 (1963).

1. *Appellants have not satisfied the pleading requirements for alleging "hostile discrimination" or a breach of the duty of fair representation.*

It is well established that allegations of concrete facts - in contrast to general conclusions of arbitrary, capricious or unreasonable activity or unfair, invidious and irrelevant considerations - are necessary to plead a claim of breach of the duty of fair representation. This Court has set forth the law on this subject in great detail in *Hardcastle v. Western Greyhound Lines,* supra, 303 F. 2d 182 (9 Cir. 1962) cert. den. 371 U.S. 920. The detailed discussions of the pleadings involved in the Supreme Court's opinion in *Humphrey v. Moore,* 375 U.S. at 349-351, show that the principles in this regard laid down by this Court are law in all the circuits.

A review of the allegations of the complaint indicates that appellants have failed to satisfy the requirements of the cases just cited. The first count speaks generally of "unfair" and "arbitrary" action by appellees in adopting the 1963 rules; however, the only specific allegation is that appellants were not invited to participate individually in the collective bargaining negotiations (R. 115).[13] The second count speaks generally of "unfair" and "arbitrary" action by appellees in applying the rules; however, the only specific allegation, one totally unsupported by any affidavit, is that other Class B men were advanced who did not meet the standards (R. 117).

The third count is the count based on the *Humphrey v. Moore* theory (App. Br. 61). It merely charges that the appellees' decisions to deregister the appellants were "not rationally related to the longshore labor requirements of the Port of San Francisco" (R. 118, ¶ 42, incorporating ¶ 25), that PMA participated "in the denial of plaintiffs' rights to fair representation" (R. 118, ¶ 42, incorporating ¶ 31) and that appellees' actions in refusing appellants Class A status were "wrongful as heretofore alleged" (R. 119, ¶¶ 48 and 49). These allegations do not satisfy the requirements discussed by the Supreme Court at pages 349 to 351 of its opinion in *Humphrey v. Moore.*

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13. The suggestion that the ILWU and the PMA cannot amend a contract without the union's giving notice to every employe it represents who would be affected by the negotiations and giving each an opportunity to appear and present argument on the proposals is novel and disturbing. Perhaps appellants have taken this position as a result of their emphasis on Railway Labor Act cases. That Act provides a massive structure restricting bargaining and establishing a special statutory procedure for adjusting grievances and gives specific procedural rights to individual employees. See 45 U.S.C. § 153(j). The inadequacies of industrial relations under the Railway Labor Act are well known. Congress chose to provide a more workable structure under the National Labor Relations Act. See *J. I. Case Co. v. National Labor Relations Board,* 321 U.S. 332, 334-339 (1944).

2. The record affirmatively shows that there has been neither "hostile discrimination" nor a breach of the duty of fair representation.

The contract amendments attacked by appellants are valid contract provisions. The collective bargaining history set out in affidavits submitted by appellee PMA shows that the 1963 contract provisions on seniority and registration,[14] and particularly those establishing the standards under which appellants were deregistered, were adopted in the ordinary course of collective bargaining. No contentions of fact are presented by the affidavit of appellants that raise any litigable issue with respect to the collective bargaining history set forth in appellee PMA's affidavits. There is no implication that the amendments were directed at union dissidents or any other minority. Compare *Aeronautical Industrial District Lodge 727 v. Campbell,* supra, 337 U.S. 520 at 529 (1949).[15] The facts before this Court show that these contract provisions were adopted in accordance with the exercise of the reasonable discretion that a union must be accorded in negotiating on such subjects as seniority. See *Ford Motor Co. v. Huffman,* supra, 345 U.S. 330, 337-339 (1953), *International Longshoremen's & Warehousemen's Union v. Kuntz,* supra, 334 F. 2d 165, 171 (9 Cir. 1964).

Undisputed facts before this Court also show that appellees' conduct in the grievance arbitration machinery with respect to appellants' 1963 grievances was beyond reproach. The factual claims presented by appellants in no way conflict with the facts shown in the affidavits submitted by appellee PMA with regard to the procedure followed in handling the grievances that appellants filed in July, 1963. The affidavits show that a full record was developed based on exhaustive litigation in adversary hearings in which

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14. Appellants call these "the 1963 Rules".

15. The relevant language is quoted at page 47 above.

appellants were represented throughout by counsel chosen by them. It shows full opportunity for appellants to appear at the hearings, to have in front of them a detailed summary of the first hearings which was prepared for the use of the committee, to offer all evidence that they desired to offer, to present whatever argument they might wish - whether orally or in writing - using their own freely selected counsel for these purposes. The affidavits show that the appellants were given every opportunity to participate in the proceedings and to present their cases but that appellants consistently ignored their opportunities while preserving their positions through their perfunctory arguments and their timely appeals until they received the final decision by the Joint Coast Committee. In no way is there any claim that any facts exist showing that the union went beyond its recognized proper function of sorting out good grievances from bad grievances and making the collective bargaining process work by agreeing with the employer where there clearly was not merit in the grievances at issue. *Humphrey v. Moore, supra,* 375 U.S. 335, 349-350 (1964); *Local Union No. 12405, Mineworkers v. Martin Marietta Corp.,* 328 F. 2d 945 (7 Cir. 1964); *Ostrofsky v. United Steel Workers,* 171 F. Supp. 782 (D. Md. 1959), aff'd 273 F. 2d 614 (4 Cir. 1960), cert. den. 363 U.S. 849.[16]

The National Labor Relations Board has held that there was no hostile discrimination or breach of duty of fair representation by the ILWU in the negotiation and the administration of "the 1963 Rules" in deregistering other Class B longshoremen. Claims were presented to the Board

16. The per curiam opinion of the Fourth Circuit states: "For the reason that the plaintiffs utterly failed to cooperate with the union . . ., we think the union was neither unreasonable nor arbitrary in refusing to prosecute the grievances of the plaintiffs. Consequently, no right of action has accrued to them against the union or against their former employer."

asserting that the charging parties had been victims of a breach of the duty of fair representation as a result of the 1963 contract negotiations and the administrative decision to deregister made by the Joint Port Committee in June, 1963. After extensive hearings, the trial examiner reached conclusions that the limited registration (Class B) longshoremen were deregistered by the June action of the Joint Port Committee for "irrelevant, invidious, and unfair reasons" (R. 231, 256). However, when the issues were presented to the Board, it concluded that there had been no breach of the duty of fair representation by the ILWU and that the Class B longshoremen deregistered had properly been denied an improvement in their seniority status and had been properly discharged. (See Appendix A to this brief.)

Appellants specifically disclaim any reliance on discrimination of the only type that is suggested in the record before this Court. They specifically assert that their complaint in court is not based in any way on acts by the union or the employers that would amount to discrimination in violation of § 13 of the collective bargaining contract (App. Br. 72). This section makes it a contract violation to discriminate "in connection with any action subject to the terms" of the contract so as to effect a breach of the duty of fair representation or hostile discrimination as it has been defined by the courts. It is beyond controversy that all of the assertions of fact presented by appellants' affidavit regarding hostile discrimination or breach of the duty of fair representation are within the ambit of § 13. If appellants in their brief assert that some other discrimination occurred, they in no way attempt to define it. (Cf. App. Br. 72).

Perhaps appellants stated their disclaimer in the hope that they would be able to avoid the consequences of their

not using the arbitration step in the grievance-arbitration remedy for claims of § 13 violation. However, by their disclaiming reliance on § 13 discrimination - whatever may have been their reason therefor - appellants have admitted there is no litigable issue as to any claims that such discrimination occurred. Compare *International Longshoremen's & Warehousemen's Union v. Kuntz,* supra, 334 F. 2d 165, at 170, note 7 (9 Cir. 1964). It is clear, we submit, that there is not even a suggestion of a fact of any other type of discrimination, if there be any other type.

C. Appellants have no standing to assert a contract violation because they failed to exhaust the grievance-arbitration procedures of the collective bargaining contract they claim was violated.

Appellants' complaint asks the court to set aside the decision of the Joint Coast Committee of December 18, 1964 (R. 114, ¶ 24). However, no excuse can be offered for appellants' failing to take their grievance to arbitration. It is interesting to note that appellants in their brief, despite their attempt to discredit the integrity of the Joint Port Committee and the Joint Coast Committee, make no attempt to discredit the integrity of Professor Kagel, the Coast Arbitrator. We suggest that appellants are aware of Professor Kagel's professional and personal reputation and that such an attack would be unavailing.

1. Appellants failed to appeal the decision of the Joint Coast Committee to the arbitrator.

In paragraph 24 of the complaint, appellants allege that they have "exhausted all appeals provided under the collective agreement and that their appeals have been rejected . . ." by the Joint Coast Committee, described by them as "the highest appeal body available to the plaintiffs for appeal of their grievance" (R. 114). The record proves the inaccuracy of this allegation. It is conclusively established

that appellants have not exhausted their arbitration remedies under the collective bargaining agreement (R. 83).

Appellants apparently seek to support the contention that they have exhausted the grievance-arbitration procedure by asserting that the procedure available to them was that provided in §§ 17.23, 17.26 and 17.261 of the contract (App. Br. 16-17, 70-73). These clauses have no relation to the discrimination grievances that appellants filed in July of 1963, which led to the Joint Coast Committee decision that is here under attack. These grievances were filed after the Joint Port Committee gave notice that it was sustaining the deregistration of appellants.

Each appellant had available to him at that time a specific contract grievance-arbitration procedure for any claims of discrimination. In this procedure, he could litigate claims that he had been denied his contract rights because of "hostile discrimination" or a breach of the duty of fair representation. The procedure is set forth in the sections beginning with § 17.4, which reads:

> "17.4 When any longshoreman (whether a registered longshoreman or an applicant for registration or a casual longshoreman) claims that he has been discriminated against in violation of Section 13 of this Agreement, he may at his option and expense, or either the Union or the Association may at its option and at their joint expense, have such complaint adjudicated hereunder, which procedure shall be the exclusive remedy for any such discrimination."

The remedy is begun by filing a grievance with a Joint Port Committee (§ 17.41). The individual involved is permitted to appear and state his case, and to present oral and written evidence and argument. Either of the contract parties or the man involved may take an appeal from the Joint Port Committee to the Joint Coast Committee (§ 17.42). The Joint

Coast Committee considers the matter and issues its decision (§ 17.421). An appeal from its decision may be presented to the Coast Arbitrator by either of the contract parties or by the individual involved, but no later than seven (7) days after issuance of the committee's decision (§ 17.43). These procedures are the exclusive remedy for claims of discrimination (R. 4, page 65).

In July, 1963, after they were notified of their deregistration, appellants herein each filed his grievance with the Joint Port Committee claiming that it had "consummated an action that is discriminatory" in discharging him. They asked for hearings "to prove and document this discrimination" R. 2, 4 L, see above, page 14). Their grievances were thereafter handled as ones for discrimination under § 17.4 et seq. of the contract."[17]

On May 29, 1964, while those grievances were pending before the Joint Port Committee, B. H. Goodenough's affidavit was filed in this litigation. It expressly stated that if any man should be dissatisfied with the decision of the port committee on his pending grievance ". . . he has the right to carry it on through the grievance step (as set forth in § 17.4 through 17.431 . . .), first to the Coast Labor Relations Committee and then to the Coast Arbitrator . . ." (R. 2-3). As discussed in our Statement of the Case, pages 14-16 above, appellants and their attorney were given every opportunity to appear, present evidence and make oral argument at every level of these proceedings.

As we have also set out, the record is clear that: (1) appellants did not appear at the Joint Port Committee hearings although they, and their counsel, were expressly

17. We trust the Court will not be misled by appellants' charges that appellees "for their own ulterior purposes" designated appellants' grievances as "complaints of discrimination" long after the within litigation was commenced (App. Br. 73).

invited, (2) they did receive a copy of the decision and appealed this decision to the Joint Coast Committee, (3) they did not follow through on their appeal to the Joint Coast Committee by appearing at its hearing, except for one appellant, and they filed no more than a perfunctory argument, and (4) they did not even attempt to resort to the most crucial and ultimate step - before this impartial and highly competent arbitrator - after receiving the decision of the Joint Coast Committee.

2. *Those who seek to enforce a collective bargaining contract are required by law to exhaust the remedies provided in that contract.*

Federal labor law is strikingly consistent in favoring arbitration as the means of settling industrial and employment disputes. *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957); *United Steelworkers v. American Manufacturing Company,* 363 U.S. 564 (1960); *United Steelworkers v. Warrior and Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960); *Drake Bakeries v. Local 50,* 370 U.S. 254 (1962); *Smith v. Evening News Association,* 371 U.S. 195 (1962); and *Carey v. Westinghouse Electric Corp.,* 375 U.S. 261 (1964). This policy favoring arbitration is so strong that the Supreme Court, when asked to enforce a contract's provision for arbitration, stated:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkers v. Warrior & Gulf Navigation Co.,* supra., 363 U.S. 574, 582-583 (1960)

A more recent opinion, in *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965), holds that Congress has expressly ap-

proved contractual grievance procedures as a "preferred method for settling disputes and stabilizing the 'common law' of the plant" (379 U.S. at 653).

> ". . . Federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* to use the contract grievance procedure agreed upon by employer and union as the mode of redress." (379 U.S. at 652.)

One who is seeking, under § 301, to enforce the terms of a collective bargaining agreement should not be permitted to avoid remedies provided for his relief in that contract.

> "A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements' [Cases cited.]" (379 U.S. at 653).

Nothing in *Maddox* suggests that an individual employe may simply ignore the grievance machinery. He must *attempt* to use it. If he wants to excuse his not using that machinery, he must be able to allege facts to show that the union has refused to press his claims or has only perfunctorily represented them in the grievance procedures. This cannot be done in this case because the ILWU-PMA agreement gives to the *individual employe* himself the right to initiate his grievance, to press his claim through the various stages of hearing, and finally to appeal to an impartial arbitrator, a man whom he agreed would serve as arbitrator.

We submit that the failure to exhaust the grievance-arbitration procedure establishes that appellants do not have the necessary standing to sue. Cf. *Smith v. Evening News Assn.*, 371 U.S. 195, notes 1 and 9 (1962).

3. Appellants' efforts to escape the consequences of not appealing to the arbitrator are unavailing.

Appellants claim a preliminary hearing was "unfair" to them. Appellants make conclusionary allegations that they were denied a fair hearing by the Joint Port Committee when their requests to set aside their deregistrations were first considered by the committee during the proceedings in which appellants directly participated. For instance, they state (without offering record references) that "all the fundamental criteria of procedural fairness were absent or refused". They state:

> ". . . There can be no doubt that the plaintiffs did attempt to use the contract grievance procedure, that the union not only refused to assist them but, in fact, acted as their prosecutors and that the plaintiffs found these procedures inadequate to protect their interests after a strenuous attempt to implement them." (App. Br., p. 75).

Appellants state in their brief that they have "shown" that the proceedings involving the deregistration "were largely a farce", that they were denied counsel, etc. (App. Br. 82-83). But still no record references are offered. We are referred only to the Weir affidavit (R. 289) in general. *And the Weir affidavit deals only with the proceedings prior to the time the grievances were filed attacking the acts of the port committee as being discriminatory.* There is nothing relevant in the Weir affidavit that indicates that appellants were denied a fair hearing in the grievance hearings considering their charges of discrimination. To the contrary, for example, they were represented by coun-

sel throughout the lengthy Unemployment Insurance hearings when the basic grievance procedure record was made and their counsel was used throughout the port and coast steps to present argument and file appeals.

Aside from the foregoing, it is clear that appellants can show no injury arising out of the conduct of the preliminary hearing.

Quite clearly the grievance machinery with respect to the claims of discrimination is to give a remedy to any man who feels that he has not previously received a fair hearing because, *inter alia,* he is hostile, bad, or indifferent in his relations with his union, or is a "reformer", or is critical of the union, its officers and its collective bargaining policy. The grievance machinery of the ILWU-PMA Agreement, § 17.4 et seq., gives the individual longshoreman an administrative remedy similar to the judicial remedy spelled out by the Supreme Court in *Humphrey v. Moore.* It provides a remedy to anyone who claims that he has been denied rights guaranteed to him under his collective bargaining contract by the union's breach of its duty of fair representation. Having instituted grievances in this special grievance-arbitration procedure and having carried through to the final decision of the Joint Coast Committee, the contention that they need not go to the arbitrator *because they were denied fair representation by the union at the earlier hearing under review* is utterly specious.

Appellants are not in a situation such as that of the teamsters in *Humphrey v. Moore.* There, the employes alleged that they had been deprived of vested contractual seniority rights by the union president's improper activity *during the grievance proceedings.* No facts have been alleged by appellants, or even suggested, giving rise

to such a claim in *this* complaint. On the contrary, they have alleged that they have exhausted their contractual grievance-arbitration remedies by proceeding through the Joint Coast Committee (R. 114, ¶ 24). Now, being faced with a record that indicates conclusively that they did not complete those steps, because they elected not to appeal that committee's decision to arbitration, they attempt to suggest reasons why they might have been excused from taking the steps that they *did* take, such as filing their initial discrimination grievance with the Joint Port Committee, or appealing from its decision and participating, although perfunctorily, in the Joint Coast Committee's proceedings.

Appellants also claim delay as an excuse. Appellants' brief offers citations of supposed authority for their contention that the eight-month delay in the grievance procedure before they filed suit constituted sufficient excuse for them to disregard the final step of the grievance-arbitration procedures. Assuming for purposes of argument that delay might justify a refusal to proceed in the grievance procedure, we point out (1) that the facts here show no "delay" and (2) that appellants and their attorney used the discrimination grievance-arbitration procedure until the Joint Coast Committee issued its decision.

We shall not repeat here the facts concerning the multitude of proceedings, including many court hearings on procedural questions raised by appellants herein, following the 1963 deregistration. This is adequately discussed in our Statement of the Case (See 15-19, above). The preparation of the record for the disposition of the grievances through the adversary process at the unemployment insurance litigation was, as we have said, a lengthy process. That record was made available in May, 1964. Grievance

hearings were held that same month, and this record was incorporated into the grievance record. The Joint Port Committee ordered preparation of a summary of the record and directed that copies of the summary be made available to all appellants. From the time appellants were given the opportunity to respond to the summary in September, 1964, to the time of the Joint Coast Committee's decision on December 18, 1964, only *three* months were involved. In view of these facts, the claim of "delay" cannot now be used as an excuse for the failure to appeal the decision of the Joint Coast Committee to the arbitrator. No case to the contrary is cited.

Appellants refer to the statement in *Born v. Cease,* 101 F.Supp. 473 (D. Alaska, 1951), referring to the need for "plain, speedy and adequate" remedies in appeals within labor unions (App. Br. 76). The court in that case noted that although the defendant union and the defendant union trustee claimed a defense that Born had failed to exhaust internal union appeal remedies, neither defendant had offered into evidence the union constitution purportedly giving plaintiff such a right to appeal. The court speculated that such a right might not exist (as plaintiff claimed) and then repudiated the claimed defense by saying that Born had no "plain, speedy and adequate" remedy. No mention whatsoever is made of the time factor involved. The court thereupon dismissed the complaint for lack of jurisdiction, holding that the matters of which Born complained were within the exclusive jurisdiction of the NLRB (101 F.Supp. at 475-477).

Appellants also cite *Booth v. Security Mutual Life Ins. Co.,* 155 F.Supp. 755 (D. N.J., 1957), a diversity of citizenship suit against trustees for breach of trust as to trust funds. The court held that plaintiffs need not wait

for the defendant trustees *to sue themselves for fraud.* It held that the usual rule requiring exhaustion of internal remedies would not therefore be applied. The opinion had no bearing on the instant appeal.

In *Flaherty v. McDonald,* 178 F.Supp. 544 (S.D. Calif., 1959), another diversity of citizenship case involving internal union matters, plaintiffs were former union officers who were suing to regain control of the local from the present officers. The court recognized that the general rule would require them to exhaust their internal remedies. It stated that in this particular case, however, time was unquestionably "of the essence" in that justice demanded an adjudication of plaintiffs' rights prior to the convening of the international union's convention.

Appellants' citations of cases arising out of the specific four-month time limit provisions of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411, et seq., are clearly not in point. No similar provisions are found in the National Labor Relations Act or, more precisely, in § 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

CONCLUSION

The complaint and the evidentiary material submitted by affidavits show that there was no triable issue of fact in the district court. The Joint Coast Committee issued its decision holding that the "1963 Rules" were a part of the contract and applicable, that they had been uniformly applied to all applicants, that appellants had each failed to meet the standards of these rules, and that the foregoing facts established that appellants had not been the victims of any discrimination prohibited by the contract. There is no basis for a collateral attack on this grievance decision.

Appellants' claim that the *Steele* line of cases permits the federal courts to review the contract amendment and this grievance decision is without merit. The cases cited are not in point. There is an administrative remedy. It is adequate. It is what Congress has provided. It is exclusive.

There is no merit to appellants' use of the *Humphrey v. Moore* theory. Appellants have not shown there is any factual issue regarding the findings of the Joint Coast Committee that there was no violation of the ILWU-PMA collective bargaining contract. Furthermore, appellants have failed to exhaust the exclusive administrative remedy for any claim of contract violation they might have. The proper remedy for any appellant who seriously believed that his deregistration was a contract violation because of a breach of the duty of fair representation was to litigate his complaint in the contract's grievance-arbitration machinery for discrimination issues. Appellants, through their lawyers, took all of their claims of contract violation through this route, short of the arbitration by the Coast Arbitrator, Professor Sam Kagel. They then permitted the decision against them to stand without an appeal.

The applicable policy of federal law favors the use of the grievance-arbitration procedure for controversies such as is here provided. The contract gave appellants remedies, both directly and through the grievance-arbitration procedure on discrimination claims. The National Labor Relations Act gives a concurrent statutory remedy for breach of the duty of fair representation. The federal courts have not created a further remedy for those who ignore those regularly available.

Respectfully submitted,

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Dated, San Francisco, February 3, 1967

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Mary C. Fisher

(Appendices Are in a Separate Volume)